

-Syllabus is updated as of 11/2 and subject to further change-

Intelligence and International Law

Professors Asaf Lubin, Matthew Waxman

Fall 2023

Wednesdays 2:20pm-4:10pm
Room: WJWH 101

Much of our international relations revolve around intelligence collection and analysis. From the Elizabethan days of Sir Francis Welsingham—the father of modern intelligence agencies and the first spymaster to manage an omnipresent mass surveillance program across the European continent—all the way to the Chinese spy balloon that traversed Montana’s airspace earlier this year, intelligence seems to guide world politics. Examples of the impact intelligence has on foreign policy abound and cross generations. Compare, for example, the U-2 spy planes that uncovered the Soviet missile sites in Cuba during the Cold War to modern-day Iranian exiled dissidents claiming evidence of hidden nuclear facilities in Tehran. The details of a US-British worldwide bulk interception programs leaked by a former CIA computer specialist, Edward Snowden, made top headlines in nearly every major world news source in a matter of hours. Classified documents found in the private homes and offices of former and current Presidents and Vice-Presidents have equally controlled media cycles. As did reports about confidential documents detailing American national security secrets on Ukraine, the Middle East, and China which were posted on social media in April by Massachusetts Air National Guard Jack Teixeira. Whistleblower interviews and caches of hacked email exchanges have truly emerged as the new hot commodity of our data-obsessed information society.

Much like international relations, our international legal order is as well dependent upon the elusive estimations of intelligence bureaus. Intercepted transmissions are used to determine the immanency of a threat in peacetime, and strategic reconnaissance serves a vital tool in making military proportionality assessments in wartime. Secret spies and geospatial imagery become key evidence in managing well-functioning international financial sanctions regimes, in attributing state responsibility for wrongful acts, or even in assigning individual criminal liability for international crimes. Just consider the recent arrest warrant issued by the International Criminal Court against Vladimir Putin for ordering the unlawful deportation of Ukrainian children. In reaching its decision, the Pre-Trial Chamber relied, among other things, on complex analysis of open source satellite images, social media posts, and terrain modelling, all confirming the locations of the re-education and adoption facilities in Russia used to house the abducted children.

Intelligence plays such a cardinal role in our public world order that one would have presumed there to be well-established rules of international law, undergirded by a vibrant academic and jurisprudential discourse, that would govern the ways nations compile, analyse, verify, and promulgate intelligence. Instead, as noted by Professor Simon Chesterman, intelligence exists in a “legal penumbra, lying at the margins of diverse legal regimes and at the edge of international legitimacy.” This ominous contention is one shared by many international legal scholars and practitioners.

-Syllabus is updated as of 11/2 and subject to further change-

This seminar will examine the accuracy and broader implications of this proposition. In doing so the seminar will explore such topics as:

- Spying in Peacetime and Friendly Relations: Sovereign Equality, Territorial Integrity, Non-Intervention, Diplomatic Relations, and the Peaceful Resolution of Conflicts.
- The Geographical Zoning of Espionage: The Legality of Reconnaissance Missions from the Oceans, Airspace, Outerspace, and Cyberspace.
- The Law on Signals Intelligence (SIGINT): Mass Surveillance, Government Hacking, and the Right to Privacy in the Digital Age.
- The Law on Human Intelligence (HUMINT): The Law Governing Enhanced Interrogation Techniques, Non-Official Covers (NOCs), and the use of Blacksites.
- The Secret Life of International Law: Secret Treaties, Secret Practice, and the Evolution of Custom in the Law of Intelligence.
- The Privatization of Espionage and International Law: From George Clooney's Harvard Satellite Sentinel Project (SSP) to NSO Group—Are there Inherently Sovereign Functions in International Law?
- Intelligence in Wartime: On the Use of Intelligence in Targeting, in Humanitarian Aid, in Atrocity Crime Prevention, and in the Management of Occupied Territories.
- Intelligence Sharing: From the Five Eyes to the Shanghai Cooperation Organization and the role of Peer Constraints in the Development of Intelligence Oversight and Accountability.

This is an advanced international law seminar, so any prior course in international law (and working knowledge of basic international law concepts) is a prerequisite.

Seminar Requirements: Students will be required to participate actively in class discussions (25% of the grade), to produce four response papers throughout the semester (25% of the grade), and to produce a final research paper on a topic either chosen from a list of suggested topics or separately approved by the instructors. The list of paper topics and other specific instructions concerning the response papers and final seminar paper will be provided on the first day of class.

Syllabus

The bellow syllabus of assignments may be varied in the course of the semester and in light of anticipated legal and political developments surrounding this ever-changing area.

Required readings are provided in either the printed course pack (which you should pickup ahead of the first day of classes) or in digital form on courseworks as indicated in this syllabus. *Occasionally, specific page numbers or paragraph numbers are indicated, please make sure you follow those instructions to avoid reading beyond what is required.*

All suggested readings are provided in digital form on courseworks or through the internet links provided in this syllabus.

Week 1: The Definition and Function of Intelligence in World Public Order

Wednesday (9/6)

At the beginning of the class, we will provide an overview of the seminar and learning objectives, methods, materials, and student requirements. Students who are shopping and wish to know more about the seminar are welcome to come to this first meeting. The core of the class will focus on identifying a working definition of “intelligence operations.” Given that there is no universally accepted customary definition of the concept of espionage in international law, throughout the class we will workshop alternative definitions, proposing and debating the promise and limits of varied terms and concepts. In the process, students will be introduced to a large set of elements and features that make up the professional tradecraft of spying. We will learn about the intelligence cycle, about the functions of intelligence in world politics and international affairs, about the resource limitations and biases that plague the profession, and about the institutional structures and designs of modern intelligence agencies. The goal of this session is to make the world of spycraft familiar even to those for whom the field seems jarring or inaccessible.

Required Readings:

Provided in Course Pack

- 50 U.S. Code § 3093 - Presidential approval and reporting of covert actions (excerpts provided in student packet).
- Asaf Lubin, *The Liberty to Spy*, 61 HARV. INT’L. L. J. 185, 191-194 (2020).

Provided through Courseworks

- MARK M. LOWENTHAL, *INTELLIGENCE: FROM SECRETS TO POLICY* (9th ed., 2023), Chapters 1, 4.
- BRIAN STEWART & SAMANTHA NEWBERY, *WHY SPY?: ON THE ART OF INTELLIGENCE* (2015), pp. 1-7; 85-98.
- Michael Warner, *Wanted: A Definition of “Intelligence”—Understanding Our Craft*, 46 STUD. INTEL. 15-22 (2002).
- W. MICHAEL REISMAN & JAMES E. BAKER, *REGULATING COVERT ACTION: PRACTICES, CONCEPTS, AND POLICIES OF COVERT COERCION ABROAD IN INTERNATIONAL AND AMERICAN LAW* (1992), Chapters 1, 2 and 7.
- SOPHIE DUROY, *THE REGULATION OF INTELLIGENCE ACTIVITIES UNDER INTERNATIONAL LAW*, 17-21 (2023).

Suggested Readings:

- Thomas F. Troy, *The “Correct” Definition of Intelligence*, 4 INT’L. J. INTEL. & COUNTERINTEL. 433-454 (1991).
- Dr. Ursula M. Wilder, *The Psychology of Espionage*, 61 STUD. INTEL. 19-36 (2017).
- Michael Warner, *Intelligence in Cyber and Cyber in Intelligence*, in *UNDERSTANDING CYBER CONFLICT: FOURTEEN ANALOGIES* 17-29 (George Perkovich & Ariel E. Levite eds., 2017).

Week 2: Espionage as an Unfriendly Act: From the U.N. Charter to Diplomatic Relations

Wednesday (9/13)

The international law of intelligence exists in a tension. On the one hand is the vast clandestine and historical state practice of spymasters and intelligence agencies. These agencies operate within a *Lotus* world of action, one in which “states may spy on each other—and on each other’s nationals—without restriction,” justifying their behavior through the *argumentum ad hominem* of “*tu quoque*” (you did it too). Intelligence agencies, for the most part, self-regulate through the generation of an operational code of conduct, a set of rules of the road generally understood and abided by all, though resisting any formal codification. On the other hand, is the Westphalian legal order which is rooted in principles of territorial integrity, diplomatic inviolability, political independence, and the prohibition on coercive interventions and extraterritorial enforcement jurisdiction. These principles of friendly relations form a myth system which undergirds the core existing frameworks of positivist public international law doctrine. This class will zoom in on this presumed tension between the myth and the code. We will explore whether the myth is sufficient in determining whether espionage is inherently lawful or unlawful, peaceful or aggressive, just or unjust. In so doing, we will question these very binaries and explore an alternative vision of international law which rejects a dogmatic adoption of *Lotus*.

Required Readings:

Provided in Course Pack

- United Nations Charter, Preamble, Articles 1-2, 33, 39-41, 51, 103, 105.
- UNGA Res. 25/2625, Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (1970).
- Vienna Convention on Diplomatic Relations, Preamble, Articles 3, 9, 22, 24, 27, 29, 31, 41 (1961).
- SS. *Lotus* (France v. Turkey), Judgment, 1927 P.C.I.J Ser. A, No. 10 (Sep. 7) (read pages 10-12 (the facts), pages 18-20, 31, 33).
- Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, ICJ Adv. Op. (22 July 2010), Declaration of Judge Simma.

Provided through Courseworks

- KIRSTEN SCHAMALENBACH, CASEBOOK INTERNATIONALES RECHT (deutsch/english), Case 1: NSA – No Secrets Allowed.
- Simon Chesterman, [The Spy Who Came in from the Cold War: Intelligence and International Law](#), 27 MICH. J. INT’L. L. 1071 (2006), 1071-1100.
- John Radsan, [The Unresolved Equation of Espionage and International Law](#), 28 MICH. J. INT’L. L. 597 (2007).
- MARY MANJIKIAN, GENDER, SEXUALITY, AND INTELLIGENCE STUDIES: THE SPY IN THE CLOSET (2020), 42-56.

Suggested Readings:

- Ashley Deeks, [An International Legal Framework for Surveillance](#), 55 VA. J. INT’L. L. 291 (2015).

-Syllabus is updated as of 11/2 and subject to further change-

- JOHN KISH, INTERNATIONAL LAW AND ESPIONAGE Chapter 2: Diplomacy and Espionage (David Turns ed., 1995)
- Asaf Lubin, [The Prohibition on Extraterritorial Enforcement Jurisdiction in the Datasphere](#), in HANDBOOK ON EXTRATERRITORIALITY IN INTERNATIONAL LAW (Austen L. Parrish and Cedric Ryngaert eds., forthcoming, 2023).
- Scholarship relating to the future of the *Lotus* principle:
 - Hugh Handeyside, *The Lotus Principle in ICJ Jurisprudence: Was the Ship Ever Afloat?*, 29 MICH. J. INT'L. L. 71 (2007).
 - An Hertogen, *Letting Lotus Bloom*, 26 EUR. J. INT'L. L. 901 (2015).
 - Marco Vöhringer, *State Jurisdiction and the Permissiveness of International Law: Is the Lotus Still Blooming?*, VII LSE L. Rev. 29 (2021).
 - Anne Peters, *Does Kosovo Lie in the Lotus-Land of Freedom?*, 24 LEIDEN J. INT'L. L. 95 (2011).
- International Court of Justice, *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*:
 - [Timor-Leste Memorial](#) (focus on paras. 1.1-1.9, 2.2-2.47, 4.2-4.27, 5.1-5.66, 6.1-6.28).
 - [Australia Counter-Memorial](#) (focus on pages 10-16, 24-35, 58-68, 100-101, 104-116).
 - [Summary of ICJ's Ruling on Provisional Measures](#) (Mar. 3, 2014).
 - Kate Mitchell & Dapo Akande, [Espionage & Good Faith in Treaty Negotiations: East Timor v Australia](#), EJIL: TALK (Jan. 20, 2014).
 - Donald K. Anton, [The Timor Sea Treaty Arbitration: Timor-Leste Challenges Australian Espionage and Seizure of Documents](#), 18(6) ASIL INSIGHTS (Feb. 26, 2016).
 - Paul Karp, [Australia and Timor-Leste Strike Deal on Maritime Boundary Dispute](#), THE GUARDIAN (Sept. 2, 2017).
 - Christopher Knaus, [Witness K: ex-judge condemns prosecution of Timor-Leste bugging whistleblower](#), THE GUARDIAN (July 4, 2018)

Week 3: Existing Discourse on the Regulation of Espionage in International Law

Wednesday (9/20)

This class will canvas the various articulations that have been put forward in both legal discourse and in the scholarship of moral and political philosophers for the regulation of peacetime espionage. In class we will discuss old school absolutist theories: permissivists (“spying is always legal”), prohibitionists (“spying is always illegal”), and extralegalists (“spying is neither legal nor illegal”) and new school relativists theories (“spying is sometimes legal and sometimes illegal”). These relativist theories will be further broken down into three subgroups: piecemeal scholarship (which puts an emphasis on general international law, such as rules of sovereignty, non-intervention, and immunities as the basis for legal line drawing), pragmatists scholarship (which suggests that any line drawing will be done behind-the-scenes through intelligence agencies’ self-regulation, through peer constraints, and through domestic and international administrative procedures), and just intelligence and ethical intelligence scholarship (which suggests that the intelligence can be regulated as such (*per se* regulation) through reliance on ethical standards. These intelligence ethical standards could draw guidance from just war theory or from broader rules of moral ethics).

Required Readings:

Provided in Course Pack

- SUN TZU, THE ART OF WAR 124 (Lionel Giles Trans., 2015) (5 Century BC).
- Nizam Al-Mulk, BOOK OF GOVERNMENT, *reprinted in* LATHROP, THE LITERARY SPY: THE ULTIMATE SOURCE FOR QUOTATIONS ON ESPIONAGE & INTELLIGENCE 226 (2004) (11th Century).
- HUGO GROTIUS, THE LAW OF WAR AND PEACE, Book III, Ch. IV, 655 (Kelsey trans., Oxford, 1925) (1625).
- IMMANUEL KANT, *PERPETUAL PEACE: A PHILOSOPHICAL SKETCH (1795) and THE METAPHYSICS OF MORALS (1797)*, in *KANT: POLITICAL WRITINGS (Hans Reiss ed., H.B. Nisbet trans., 1st ed., 1970)*.
- THOMAS HOBBS, ON THE CITIZEN (DE CIVE) (1642), *as summarized in* Roni Erskine, “As Rays of Light to the Human Soul”?: *Moral Agents and Intelligence Gathering*, in 2 ETHICS OF SPYING: A READER FOR THE INTELLIGENCE PROFESSIONAL (Jan Goldman ed., 2010).
- Ernst Immanuel Bekker, Staatsverträge wider die Spione (State Treaties Against Espionage), 17(5) DJZ 297, 297 (1912) (translated from the original German).
- LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 491 § 455 (vol. I, 1905).
- *Re Flesche*, Holland Special Court of Cassation (27 June 1949), *reprinted in* ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES FOR THE YEAR 1949 266-272 (Lauterpacht ed., vol. 16, 1955).
- Quincy Wright, *Espionage and the Doctrine of Non-Intervention in Internal Affairs*, in ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW (1962).
- Julius Stone, *Legal Problems of Espionage in Conditions of Modern Conflict*, in ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW (1962).
- Richard Falk, *Space Espionage and World Order: A Consideration of the Samos-Midas Program*, in ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW (1962).
- JOHN KISH, INTERNATIONAL LAW AND ESPIONAGE vii-ix, 153-155 (David Turns ed., 1995).
- COL. FABIEN LAFOUASSE, L’ESPIONAGE DANS LE DROIT INTERNATIONAL 311 (2012).
- TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS (Michael Schmitt ed., NATO CCDCOE, 2017).
- RUSSELL BUCHAN, CYBER ESPIONAGE AND INTERNATIONAL LAW (2018).
- Ashley Deeks, *An International Legal Framework for Surveillance*, 55(2) VA. J. INT’L L. 291 (2015); Ashley Deeks, *Confronting and Adapting: Intelligence Agencies and International Law*, 102 VA. L. REV. 599 (2016); Ashley Deeks, *Intelligence Communities, Peer Constraints, and the Law*, 7 HARV. NAT’L. SEC. J. 1 (2015).

Provided through Courseworks

- Christopher D. Baker, [*Tolerance of International Espionage: A Functional Approach*](#), 19 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 1091 (2003).
- Case Concerning United States Diplomatic and Consular Staff in Teheran (US v. Iran), Judgement, 1980 I.C.J. Rep. 451 (May 24) (**read paragraphs 26, 69-75, 82-89**).
- Jadhav Case (India v. Pakistan), Judgement, 2019 I.C.J. Rep. 418 (July 17) (**read paragraphs 20-32, 68-98**).

-Syllabus is updated as of 11/2 and subject to further change-

Suggested Readings:

- ASAF LUBIN, THE INTERNATIONAL LAW OF INTELLIGENCE: THE WORLD OF SPYCRAFT AND THE LAW OF NATIONS, *Chapter 2: Existing Legal Frameworks and their Inadequacies* (forthcoming, 2024).
- Craig Forcese, [Spies Without Borders: International Law and Intelligence Collection](#), 5 JOURNAL OF NATIONAL SECURITY LAW AND POLICY 179 (2011).
- Russell Buchan, [The International Legal Regulation of State-Sponsored Cyber Espionage](#), in INTERNATIONAL CYBER NORMS: LEGAL, POLICY, AND INDUSTRY PERSPECTIVES (Osula & Rõigas eds., NATO CCD COE Publications, 2016).
- [Weber & Saravia v. Germany](#), European Court of Human Rights, App. No. 54934/00 (read paragraphs 1-13 (the facts), paragraphs 87-88).
- Kate Mitchell & Dapo Akande, [Espionage & Good Faith in Treaty Negotiations: East Timor v Australia](#), EJIL: TALK (Jan. 20, 2014).
- Canadian Supreme Court, [Re Canadian Security Intelligence Service Act](#) (2009) (**read only paras. 1-3, 45-55**); Canadian Federal Court of Appeals, [X \(Re\)](#) (2014) (**read paragraphs 80-82, 91, 96-101**) Canadian Federal Court, [Re Canadian Security Intelligence Service Act](#), 2022 FC 1444 (2022) (**read paragraphs 185-193**).

Week 4: The Secret Life of International Law and Intelligence

Wednesday (9/27)

International law is formed through an iterative process of action and reaction. The evolution of international law is thus inherently a public process. Yet, a great deal of the practice of nation states and organizations is classified. States rely on secret treaties and on covert activity. International organizations and courts, from the International Committee of the Red Cross to the International Criminal Court, lack their own intelligence capacities. As such, they may rely on confidentiality as a working method to gain greater access to vital information necessary to protect prisoners of war and to prosecute international crime. When behaviour occurs in the shadows, without the cleansing light of day, it risks corruption. Such clandestine behaviour further jeopardizes the iterative process that stands at the heart of international law formation. After all, how can states be expected to react (either positively or negatively) to state practice that they are simply unaware of? What weight, therefore, should such practice be given? Can such practice ever form custom and can secret treaties be enforced? Should they? This class will explore these questions and others by studying the motivations and justifications for secrecy, by cataloguing different categories of secrets in the management of intelligence and national security operations, and by exploring the effects of the practice on the evolution of positivist international legal doctrines.

Required Readings:

Provided in Student Packet

- COMM. ON THE FORMATION OF CUSTOMARY (GEN.) INT'L. LAW, INT'L. LAW ASS'N, FINAL REPORT OF THE COMMITTEE STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL L. (2000) (read only page 15, principle 5).
- Int'l. L. Comm'n, Draft Conclusions on the Identification of Customary International Law, with Commentaries, U.N. Doc. A/73/10 (2018)

Provided through Courseworks

-Syllabus is updated as of 11/2 and subject to further change-

- Sir Daniel Bethlehem, [The Secret Life of International Law](#), 1 CAMBRIDGE J. INT'L & COMP. L. 23 (2012).
- Inaki Navarrete & Russell Buchan, [Out of the Legal Wilderness: Peacetime Espionage, International Law and the Existence of Customary Exceptions](#), 51 CORNELL INT'L L. J. 897 (2019) (read only pages **914-949**).
- Ashley S. Deeks, [A \(Qualified\) Defence of Secret Agreements](#), 49 ARIZ. ST. L.J. 713 (2017), excerpted materials (read only pages **740-772**).
- ALLISON CARNEGIE & AUSTIN CARSON, SECRETS IN GLOBAL GOVERNANCE: DISCLOSURE DILEMMAS AND THE CHALLENGE OF INTERNATIONAL COOPERATION IN WORLD POLITICS (2020), (read only pages **1-13, 286-288**).
- Reactions to Spying Scandals:
 - Ashley Deeks, [The Increasing State Practice and Opinio Juris on Spying](#), LAWFARE (May 6, 2015).
 - Michael Crowley, [Once Shocking, U.S. Spying on Its Allies Draws a Global Shrug](#), N.Y. TIMES (Apr. 13, 2023).
 - Reuters, [UN chief 'not surprised' he was allegedly spied on](#), YouTube (Apr. 13, 2023).
 - [AMLO accuses Pentagon of spying on Mexico](#), Mexico Daily News (Apr. 19, 2023).

Suggested Readings:

- David Pozen, [Deep Secrecy](#), 62 STAN. L. REV. 257 (2010).
- Oona Hathway, Curtis Bradley, & Jack Goldsmith, [The Failed Transparency Regime for Executive Agreements: An Empirical and Normative Analysis](#), 134 HARV. L. REV. 629 (2020).
- Alexandra H. Perina, [Black Holes and Open Secrets: The Impact of Covert Action on International Law](#), 53 COLUM. J. TRANSNAT'L L. 507, 568 (2015).
- Megan Donaldson, [The Survival of the Secret Treaty: Publicity, Secrecy, and Legality in the International Order](#), 111 AM. J. INT'L L. 575 (2017).
- Danae Azaria, [Not All State Silences 'Speak': A Theory of \(Non-\)Communicative State Silences](#), HLS Program on International Law and Armed Conflict, YouTube (2022).
- Ashley Deeks, [Secret Reason-Giving](#), 129 YALE L.J. 612 (2019).
- Oona Hathway, [Secrecy's End](#), 106 MINN. L. REV. 691 (2021).

Espionage from the Global Commons

The global commons, those resource domains that lie outside of the political reach of any one nation have long been perceived to be territories from which acts of reconnaissance and intelligence gathering can be freely conducted. Consider in this regard the high seas, international airspace, the atmosphere, outer space, and Antarctica. In the following two classes we will look at the law as it surrounds these spaces. In the first class we will focus on airspace and outer space. We will try to trace the genealogy of the legalization of espionage in those two domains from the use of spy balloons and spy aircrafts to surveillance satellites. By looking at these case studies we will begin to identify why the international community has developed the norm that surveillance from the global commons is generally acceptable. Moving to the second class, we will turn to maritime zones and cyberspace. Consider in this regard the work of spy submarines and intelligence vessels traversing the territorial waters and exclusive economic zones of coastal states. We will ask whether espionage in those spaces serves

-Syllabus is updated as of 11/2 and subject to further change-

“peaceful purposes” and constitutes “innocent passage” in ways that provide sufficient “due regard” to the interests of others. We will conclude with cyber espionage. We will aim to explore whether the commons analogy serves a useful one in the context of interstate cyber activity, exploring such hacks as the Sony, OPM, DNC, and SolarWinds hacks. We will discuss whether we should treat “cyber” as a space, and even if so, should it be recognized as another global common where surveillance activities should generally be allowed.

Week 5: Part 1—Airspace and Outerspace

Wednesday (10/4)

Required Readings:

Provided in Student Packet

- [Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies](#), Preamble, Arts. 1-4, 6-9, 11 (1967).
- [Convention on International Civil Aviation](#) (Chicago Convention), Preamble, Arts. 1-4, 8, 36 (1944)
- [Treaty on Open Skies](#) (Mar. 24, 1992) (read Preamble, Arts. 1-4, 9, 10 as excerpted).
- United Nations General Assembly Resolution 41/65, [Principles Relating to Remote Sensing of the Earth from Space](#) (1986).
- CIA Position Paper, [Definition of Peaceful Uses of Outer Space](#) (Contingency) (Confidential) (Mar. 13, 1962) (Approved for Release Aug. 27, 2001).

Provided through Courseworks

- Joseph Soraghan, [Reconnaissance Satellites: Legal Characterization and Possible Utilization for Peacekeeping](#), 13(6) MCGILL L. J. 458 (1964).
- Bonnie Jenkins, [A farewell to the Open Skies Treaty, and an era of imaginative thinking](#), Brookings Institute (June 16, 2020).
- Catherine Amirfar, Ina Popova, Christel Tham, & Nicole Marton, [Remote Sensing from Space: What Norms Govern?](#), Just Security (May 5, 2023).
- The 2023 Chinese Spy Balloon Saga:
 - Donald R. Rothwell, [What Does International Law Say About China's Spy Balloon and the US Response?](#), The Diplomat (Feb. 6, 2023).
 - Charlie Dunalp, [Paul Stephan on "Spy Balloons and Their ilk: International Law and the Battle for Near Space"](#), Lawfire (Feb. 22, 2023).
 - Batuhan Betin, [Skies, Spies, and Scientific Surveys – The Legal Aspects of Chinese Unmanned Balloon Flight Over American Territory](#), EJIL: TALK! (Mar. 6, 2023).
 - Wolff Heintschel von Heinegg, [Balloons Are Not Always Joyful: The Legality of Downing the Chinese Spy Balloon](#), Articles of War (Mar. 10, 2023).

Suggested Readings:

- JOHN KISH, INTERNATIONAL LAW AND ESPIONAGE, Chapter 3: Territory and Espionage (David Turns ed., 1995).
- [Note: Legal Aspects of Reconnaissance in Airspace and Outer Space Columbia Law Review](#), 61 COLUM. L. REV. 1074 (1961).

-Syllabus is updated as of 11/2 and subject to further change-

- Spencer M. Beresford, [Surveillance Aircraft and Satellites: A Problem of International Law](#), 27 J. AIR L. & COM. 107 (1961).
- Cestmir Cepelka & Jamie H.C. Gilmour, [The Application of General International Law in Outer Space](#), 36 J. AIR L. & COM. 107 30 (1970).
- Stephen R. Burant, [Soviet Perspectives on the Legal Regime in Outer Space: The Problem of Space Demilitarization](#), 19 STUD. COMP. COMMUNISM 161 (1986).
- Bin Cheng, [Legal and Commercial Aspects of Data Gathering by Remote Sensing](#), in THE HIGHWAYS OF AIR AND OUTER SPACE OVER ASIA 572 (1997).
- Michael Blanding, [Inside Harvard's Spy Lab](#), BOSTON GLOBE (Apr. 29, 2012).
- Dyan Sitanggang, [International Law Analysis of the Restrictions Imposed on Remote Sensing Satellite Through Shutter Control](#), 30(2) MIMBAR HUKUM JOURNAL 375 (June 2018).
- Frans G. von der Dunk, [Outer Space Law Principles and Privacy](#), in EVIDENCE FROM EARTH OBSERVATION SATELLITES: EMERGING LEGAL ISSUES 243 (Denise Leung & Ray Purdy, 2013).
- Theresa Hitchens, [Balloons vs. satellites: Popping some misconceptions about capability and legality](#), Breaking Defense (Feb. 7, 2023).

Week 6: Part 2—The Oceans and Cyberspace

Wednesday (10/11)

Required Readings:

Provided in Student Packet

- [United Nations Convention on the Law of the Sea](#), Preamble, Articles 17-21, 24-25, 29-33, 37-40, 55-58, 87-90, 95, 112-115, 300-302 (1982).
- [Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security](#) (UNGGE Report), UNGA Res. A/70/174 (July 22, 2015)
- [Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security](#) (UNGGE Report), UNGA Res. A/76/135 (July 14, 2021)
- Excerpts of State Positions on Issues of Cyber Operations, Cyber Espionage, and Sovereignty.

Provided through Courseworks

- James Kraska, [Intelligence Collection and the International Law of the Sea](#), 99 INT'L. L. STUD. 603 (2022).
- Adam Segal, [The U.S.-China Cyber Espionage Deal One Year Later](#), COUNCIL ON FOREIGN RELATIONS (Sep. 28, 2016).
- Russell Buchan, [Cyber Espionage and International Law](#), in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND CYBERSPACE 168 (Nicholas Tsagourias & Russell Buchan eds., 2021).
- Martin Libicki, [The Coming of Cyber Espionage Norms](#), in DEFENDING THE CORE (Röigas, Jakschis, Lindström, & Minárik eds., NATO CCD COE Publications, 2017).
- The Solar Winds Hack
 - Kristen E. Eichensehr, [Not Illegal: The SolarWinds Incident and International Law](#), 33 EUR. J. INT'L. L. 1263 (2022).

-Syllabus is updated as of 11/2 and subject to further change-

- Antonio Coco, Talita Dias, Tsvetelina van Benthem, [*Illegal: The SolarWinds Hack under International Law*](#), 33 EUR. J. INT'L. L. 1275 (2022).
- Asaf Lubin, [*SolarWinds as a Constitutive Moment: A New Agenda for the International Law of Intelligence*](#), Just Security (Dec. 23, 2020).
- The Microsoft Hack
 - Zack Whittaker, [*Microsoft lost its keys, and the government got hacked*](#), TechCrunch (July 17, 2023).
 - Emily Feng, [*The White House Blamed China For Hacking Microsoft. China Is Pointing Fingers Back*](#), NPR (July 20, 2023).
 - Matt Burgess & Lily Hay Newman, [*China's Breach of Microsoft Cloud Email May Expose Deeper Problems*](#), WIRED (July 22, 2023).
 - David E. Sanger & Julian E. Barnes, [*U.S. Hunts Chinese Malware That Could Disrupt American Military Operations*](#), N.Y. TIMES (July 29, 2023).

Suggested Readings:

- James Kraska, [*Putting Your Head in the Tiger's Mouth: Submarine Espionage in Territorial Waters*](#) 54(16) COLUMB. J. TRANS'L. L. 164 (2015).
- Asaf Lubin, [*The Dragon-Kings Restraint: Proposing a Compromise for the EEZ Surveillance Conundrum*](#), 57(1) WASHBURN L.J. 17 (2018).
- Hugh White, [*How Would You Feel If China Flew Spy Planes a Dozen Miles From the California Coast?*](#), HUFFINGTON POST (10 June 2016).
- Mark J. Valencia, [*Intelligence Gathering in the Maritime Domain: Is China Using Double Standards?*](#), THE DIPLOMAT (Aug. 22, 2017).
- Catherine Lotrionte, [*Countering State-Sponsored Cyber Economic Espionage Under International Law*](#), XL N.C. J. INT'L. L. & COM. REG. 443 (2015).
- OXFORD INSTITUTE FOR ETHICS, LAW AND ARMED CONFLICT, [*THE OXFORD PROCESS ON INTERNATIONAL LAW PROTECTIONS IN CYBERSPACE: A COMPENDIUM*](#), Part IV - The Protection of IT Supply Chains under International Law (2022).
- Darien Pun, [*Note: Rethinking Espionage in the Modern Era*](#), 18 CHI. J. INT'L. L. 353 (2017).
- Asaf Lubin, [*Cyber Law and Espionage Law as Communicating Vessels*](#), in 10TH INTERNATIONAL CONFERENCE ON CYBER CONFLICT (Tomas Minárik, Raik Jakschis & Lauri Lindström eds., 2018).
- THIBAUT MOULIN, *CYBER-ESPIONAGE IN INTERNATIONAL LAW: SILENCE SPEAKS*, Chapters 10-11 (2023).
- DETER, DISRUPT, OR DECEIVE: ASSESSING CYBER CONFLICT AS AN INTELLIGENCE CONTEST (Robert Chesney & Max Smeets eds., 2023).

Week 7: The Privatization of Espionage

Wednesday (10/18)

Historically, acts of espionage were limited to a handful of nation states who solely possessed the means of conducting intelligence operations. Technological developments and the rise of corporate actors have changed that. With intelligence professionals all taking jobs in the private sector, from insurance companies to cybersecurity firms, the government no longer claims sole monopoly over the knowledge or the tools surrounding intelligence collection and analysis. In fact, the capacity limitations which ensured tighter governmental control over intelligence in generations past, are slowly beginning to erode. Even more troubling, as companies engage in

-Syllabus is updated as of 11/2 and subject to further change-

surveillance capitalism and as markets for spyware emerge, governments begin to contract out functions and powers that were previously kept internally and subject to greater democratic oversight. Intelligence outsourcing is now the new normal, as economic efficiency arguments are raised to justify the privatization of just about every aspect of the intelligence cycle. In this class we will begin to identify the motivations for privatization and the risks associated with involving commercial actors in the intelligence space. The class will zoom into the case study of commercial spyware and trade in zero-day vulnerabilities to discuss more broadly the prohibition on privatization of inherently governmental functions under both domestic and international law.

Required Readings:

Provided in Student Packet

- [Draft of a possible Convention on Private Military and Security Companies \(PMSCs\) for consideration and action by the Human Rights Council](#), Annexed to the Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, U.N. Doc. A/HRC/15/25 (2 July 2010) (Make sure you only read the draft treaty which is included as an annex to this document. Within the treaty focus on the Preamble, Articles 1, 9).
- [Executive Order on Prohibition on Use by the United States Government of Commercial Spyware that Poses Risks to National Security](#) (Mar. 27, 2023) (as excerpted).

Provided through Courseworks

- Intelligence Community Directive 612, [Intelligence Community Core Contract Personnel](#), Office of Director of National Intelligence (Oct. 30, 2009).
- Alan Z. Rozenshtein, [Surveillance Intermediaries](#), 70 STAN. L. REV. 99 (2018), (read only **pages 102-122**).
- Tim Shorrock, [US Intelligence Is More Privatized Than Ever Before](#), THE NATION (Sep. 16, 2015).
- David Kaye, [Here's what world leaders must do about spyware](#), CPJ (Oct. 13, 2022).
- [Vulnerabilities Equities Policy and Process for the United States Government](#), WHITE HOUSE (Nov. 15, 2017) (read only **pages 1-3, skim pages 4-10, and ignore the annex**).

Suggested Readings:

- Asaf Lubin, [Regulating Commercial Spyware](#), Lawfare (Aug. 9, 2023).
- David Kaye & Sarah McKune, [The Scourge of Commercial Spyware—and How to Stop It](#), Lawfare (Aug. 25, 2023).
- Simon Chesterman, ['We Can't Spy ... If We Can't Buy!': The Privatization of Intelligence and the Limits of Outsourcing 'Inherently Governmental Functions'](#), 19(5) EUROPEAN JOURNAL OF INTERNATIONAL LAW 1055 (2008), excerpted materials.
- Joshua Storm, [Student Note: Outsourcing Intelligence Analysis: Legal and Policy Risks](#), 9 J. NAT'L. SEC. L. & POL'Y 669 (2018).
- Frédéric Mégret, [Are There 'Inherently Sovereign Functions' in International Law?](#), 115 AM. J. INT'L. L. 452 (2021). Frédéric Mégret Article, excerpts from which are a required reading for this session, generated a broader symposium at AJIL Unbound, which included short commentary of the piece from the following authors (access to the symposium is available [here](#)):

-Syllabus is updated as of 11/2 and subject to further change-

- Melissa J. Durkee, *Introduction to the Symposium on Frédéric Mégret, "Are There 'Inherently Sovereign Functions' in International Law?"*
- Eyal Benvenisti, *Are There Any Inherently Public Functions for International Law?*
- Samantha Besson, *The International Public: A Farewell to Functions in International Law.*
- Jean L. Cohen, *The Democratic Construction of Inherently Sovereign Functions.*
- Nigel D. White, *Outsourcing Military and Security Functions.*
- Daniel Lee, *Defining the Rights of Sovereignty.*
- Armin Krishnan, [*The Future of U.S. Intelligence Outsourcing*](#), 18 BROWN J. WORLD AFF. 195 (2011).
- Sunny Jiten Singh, [*The U.S. Intelligence Enterprise and the Role of Privatizing Intelligence*](#), BELFER CENTER FOR SCI. AND INT'L. AFF. (2019).
- [*Privatization of U.S. Intelligence*](#), National Press Club Event, C-SPAN (Aug. 20, 2009).
- TIM SHORROCK, SPIES FOR HIRE: THE SECRET WORLD OF INTELLIGENCE OUTSOURCING (2008).
- [U.S. Department of State Guidance on Implementing the "UN Guiding Principles" for Transactions Linked to Foreign Government End-Users for Products or Services with Surveillance Capabilities](#), Bureau of Democracy, Human Rights, and Labour (Sep. 30, 2020).
- Committee of Inquiry to investigate the use of Pegasus and equivalent surveillance spyware, Eur. Parliament, [Final Report](#) (Rapporteur: Sophie in 't Veld) and [Final Recommendations](#) (May 2023).
- [*The Right to Privacy in the Digital Age*](#), Report of the United Nations High Commissioner for Human Rights, U.N. Doc. A/HRC/51/17 (Aug. 4, 2022).
- Siena Anstis, Niamh Leonard, & Jonathon W. Penney, [*Moving from secrecy to transparency in the offensive cyber capabilities sector: The case of dual-use technologies exports*](#), 48 Comp. L. & Sec. Rev. 1 (2023).
- Orin S. Kerr and Sean D. Murphy, [*Government Hacking to Light the Dark Web: What Risks to International Relations and International Law?*](#), 70 STANFORD LAW REVIEW ONLINE 58 (2017).
- The Berkman Center for Internet and Society, [*Don't Panic: Making Progress on the "Going Dark" Debate*](#), HARVARD UNIVERSITY (February 2016).
- Vulnerabilities Equities Processes:
 - [*The Equities Process*](#), GCHQ (Nov. 29, 2018).
 - Mimansa Ambastha, [*Taking a Hard Look at the Vulnerabilities Equities Process and its National Security Implications*](#), BERKELEY TECH. L.J. BLOG (APR. 22, 2019).
 - Andi Wilson Thompson, [*Assessing the Vulnerabilities Equities Process, Three Years After the VEP Charter*](#), LAWFARE (13 Jan. 2021).
- Other recent excellent scholarship on the law and political economy of privatization can be found in:
 - THE CAMBRIDGE HANDBOOK ON PRIVATIZATION (AVIHAY DORFMAN AND ALON HAREL EDS., 2021).
 - DONALD COHEN & ALLEN MIKAEIAN, THE PRIVATIZATION OF EVERYTHING : HOW THE PLUNDER OF PUBLIC GOODS TRANSFORMED AMERICA AND HOW WE CAN FIGHT BACK (2021).
 - CHIARA CORDELLI, THE PRIVATIZED STATE (2020).

-Syllabus is updated as of 11/2 and subject to further change-

- JULIE E. COHEN, *BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM* (2019).

Week 8: The Legality of HUMINT Operations and Covert Action

Wednesday (10/25)

HUMINT refers to the process of gathering information from human sources. A human source could be anyone. It may be a foreign official who, by virtue of a position of trust in his government has access to important information and who is willing, for some reason, to pass it to officers of another's intelligence service. It may involve the forced disappearance of a member of a terrorist cell and his interrogation in a black site. It may also be a non-suspecting innocent person who has traveled abroad for study or who works in a certain industry that puts her in direct contact with foreign persons of interests. Specialized Handlers develop a profound mastery in human psychology, for understanding people, with all of their complexities, is crucial to the business of running assets and collecting HUMINT. Collection methods may include in-person meetings and debriefs, secret exchanges, and remote communications using sophisticated technological means. HUMINT collection often follows an internal cycle: (a) *spotting* - identifying targets; (b) *assessing* - gaining their confidence and determining their susceptibility for recruitment; (c) *recruiting* - making a pitch to them and suggesting a relationship; (d) *handling* - managing the asset; and (e) *termination* - ending the relationship when it is called for. Are any of these procedures legal? How should the international law of espionage distinguish between legitimate and illegitimate forms of HUMINT collection? More troubling, what do we do when human spies exercise other functions that go beyond information gathering? What about assassinations, blackmail, sabotage, and smuggling? Or cover businesses and front operations? Or various psychological operations (PsyOps)? How may international law regulate this behavior?

Required Readings:

Provided in Student Packet

- [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#) (CAT) (1984), Preamble, Articles 1-16.
- [International Convention for the Protection of All Persons from Enforced Disappearance](#) (CED) (2007), Preamble, Articles 1-9, 17, 24.

Provided through Courseworks

- Ireland v. United Kingdom, App. No. 5310/71, European Court of Human Rights:
 - [Original Judgement](#) (Jan. 18, 1977) (**read only paras 11-19, 92-107, 165-172**).
 - [Decision on Request for Revision](#) (Mar. 20, 2018) (**read only paras 19-20, 78-79, 119, 127-135**).
- [Tenet v. Doe](#), 544 U.S. 1 (2005).
- Barton Gellman & Jo Becker, [Cheney reshaped limits on interrogation](#), NBC News (June 24, 2007).
- [Deans write to Obama about CIA vaccine scheme in Pakistan](#), VIROLOGY BLOG (8 January 2013).
- Oliver Knox, [After bin Laden backlash, CIA promises: No more vaccination campaigns for spying](#), YAHOO NEWS (19 May 2014).
- Greg Miller, [The intelligence coup of the century](#), WASHINGTON POST (Feb. 11, 2020) (**only skim and make sure you understand the core facts**).

-Syllabus is updated as of 11/2 and subject to further change-

- Loch K. Johnson, [On Drawing a Bright Line for Covert Operations](#), 86(2) AM. J. INT'L. L. 284 (1992) (**read only pages 284-290 and the conclusion in pages 308-309**).

Suggested Readings:

- Center for Justice and International Law (CEJIL), [Torture in International Law: A Guide to Jurisprudence](#) (2008).
- DAVID LUBAN, TORTURE, POWER, AND LAW (2014).
- Damien Gayle & Ian Cobain, [UK intelligence and police using child spies in covert operations](#), THE GUARDIAN (19 July 2018).
- US Perspective:
 - The White House, [Humane Treatment of Taliban and al Qaeda Detainees](#) (“The Bush Memo”) (Feb. 7, 2002).
 - John Yoo & Robert Delahunty, Memorandum for William J. Haynes II, General Counsel, Department of Defense, [Application of Treaties and Laws to al Qaeda and Taliban Detainees](#) (“The Yoo Memo”) (Jan. 9, 2002).
 - [Executive Order 13491](#), Ensuring Lawful Interrogations (Jan. 22, 2009)
 - Report of the Senate Select Committee on Intelligence, [Committee Study on the Central Intelligence Agency’s Detention and Interrogation Program](#) (Dec. 9, 2014).
 - Michael Scharf, [International Law and the Torture Memos](#), 42 CASE WESTERN J. INT’L. L. 321 (2009).
 - Office of the Prosecutor (OTP) of the International Criminal Court (ICC), [Public redacted version of “Request for authorisation of an investigation pursuant to article 15”](#), ICC-02/17-7-Conf-Exp (Nov. 20, 2017) (focus on paras. 13-21, 49, 51-52, 68-71, 187-252, 347-349, 352-363).
 - Wilson Andrews & Alicia Parlapiano, [A History of the C.I.A.’s Secret Interrogation Program](#), N.Y. TIMES (Dec. 9, 2014).
 - Katherine Cheasty Kornman, [Policy and Legal Implications of European Court’s Ruling on CIA “Black Sites”](#), JUST SECURITY (June 1, 2018).
 - Andrius Sytas & Lidia Kelly, [Poland, Lithuania say won’t host any new secret CIA jails](#), REUTERS (Jan. 26, 2017).
 - Alice Speri, [How the US Derailed Efforts to Prosecute its Crimes in Afghanistan](#), THE INTERCEPT (Oct. 5, 2021).
- Israeli Perspective:
 - [Public Committee Against Torture in Israel \(PCATI\) v. The State of Israel et. al.](#), Israeli High Court of Justice, H CJ 5100/94 (1999).
 - Yuval Shany, [Back to the ‘Ticking Bomb’ Doctrine](#), LAWFARE (Dec. 27, 2017).
 - Yuval Shany, [Special Interrogation Gone Bad: The Samer Al-Arbeed Case](#), LAWFARE (Oct. 10, 2019).

Week 9: The Legality of SIGINT Operations

Wednesday (11/1)

Mass surveillance is the subjugation of a large population to indiscriminate monitoring and bulk interception of digital communications. It is opposite to targeted surveillance, often a warrant-based system involving the identification of particular suspects with reasonable suspicion or probable cause. Mass surveillance is a basic feature of contemporary SIGINT operations, as exercised by most intelligence agencies. These SIGINT activities swoop in the telephone, internet, biometric data, and location records of whole populations. Many in the

-Syllabus is updated as of 11/2 and subject to further change-

intelligence community argue that preserving such wide-reaching powers is necessary to protect the homeland against external threats. In this class we will discuss this contention and some of its sub-arguments within the broader framework of international human rights law, as enshrined in such treaties as the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights and Fundamental Freedoms (ECHR). Considering the international and regional jurisprudence on the right to privacy, we will attempt to identify the legal principles that make certain mass surveillance programs lawful while prohibiting others.

Required Readings:

Provided in Student Packet

- [International Covenant on Civil and Political Rights](#) (1966), Arts. 2, 4, 17.
- [European Convention on Human Rights](#) (1950), Arts. 1, 8, 15.
- [U.N. General Assembly Resolution on the Right to Privacy in the Digital Age](#), U.N. Doc. A/RES/71/199 (Dec. 19, 2016).
- [The Right to Privacy in the Digital Age](#), Report of the United Nations High Commissioner for Human Rights, U.N. Doc. A/HRC/39/29 (Aug. 3, 2018).

Provided through Courseworks

- [Centrum För Rättvisa v. Kingdom of Sweden](#), App. No. 35252/08, European Court of Human Rights Judgment (Jun. 19, 2018) (**read only paras 12-21, 178-181, 236-294**).
- Asaf Lubin, [Introductory Note to Big Brother Watch v. UK \(Eur. Ct. H.R. Grand Chamber\)](#), 61 INT'L. LEG. MATERIALS 605 (2022) (**read only** the introductory note and ignore the annexed case itself).
- Weider and Guarnieri v. UK, App. No. 64371/16 and 64407/16, European Court of Human Rights, Judgement (Sep. 12, 2023) (**read only paras 6-24, 87-95**).
- Privacy and Civil Liberties Oversight Board, Report on the Surveillance Program Operated Pursuant to Section 702 of the FISA (Sep. 28, 2023) (**only skim the executive summary in pages 1-20**, make sure you understand in general terms what the program is, what the recommendations are, and the dissent of certain PCLOB members).
- Genna Churches & Monika Zalnieriute, ["Contracting Out" Human Rights in International Law: Schrems II and the Fundamental Flaws of U.S. Surveillance Law](#), HARVARD INT'L L.J. ONLINE. (Aug. 2020).
- F. Paul Pittman, [Biden Executive Order Seeks to Solidify European Union-U.S. Data Privacy Framework](#), WHITE & CASE (Oct. 19, 2022).

Suggested Readings

- ELIZA WATT, STATE SPONSORED CYBER SURVEILLANCE: THE RIGHT TO PRIVACY OF COMMUNICATIONS AND INTERNATIONAL LAW (2021).
- White House, [Presidential Policy Directive 28 on Signals Intelligence Activities](#) (Jan. 17, 2014).
- [Guiding Principles on Government Use of Surveillance Technologies](#), Produced by the 36 member states of the Freedom Online Coalition and joined by Albania, Bulgaria, Croatia, Ecuador, Iceland, Kosovo, Malta, and North Macedonia (Mar. 30, 2023).
- [Guide to International Law and Surveillance](#), PRIVACY INTERNATIONAL (Dec. 2021).

-Syllabus is updated as of 11/2 and subject to further change-

- Marko Milanovic, [*Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age*](#), 56 HARV. INT'L. L. J. 81 (2015).
- [REPORT OF THE EUR. COM. DEM. THROUGH LAW \(VENICE COM.\), ON THE DEMOCRATIC OVERSIGHT OF SIGNALS INTELLIGENCE AGENCIES](#) (Dec. 15, 2015).
- Thorsten Wetzling & Kilian Vieth, [*Upping the Ante on Bulk Surveillance: An International Compendium of Good Legal Safeguards and Oversight Innovations*](#), SNV (2018).
- Elizabeth Goitein, [*The Biden Administration's SIGINT Executive Order, Part I: New Rules Leave Door Open to Bulk Surveillance*](#), JUST SECURITY (Oct. 31, 2022); Ashley Gorski, [*The Biden Administration's SIGINT Executive Order, Part II: Redress for Unlawful Surveillance*](#), JUST SECURITY (Nov. 4, 2022).

Week 10: Intelligence Collaboration and Contestation

Wednesday (11/8)

Intelligence collaboration is a critical aspect of modern international relations, enabling countries to collaborate and coordinate their efforts to counter threats to national security. Intelligence sharing arrangements are varied and range from information sharing, to cover operational cooperation, to hosting facilities and equipment, to training and capacity building, to providing various hardware and software. Intelligence collaboration raises a host of legal and ethical challenges. For one, the process involves outsourcing intelligence activity to foreign governments. This by default entails less democratic accountability and more limited oversight. Where cooperation is used to circumvent national legal regulations, including constitutional protections over privacy, the practice poses an even greater risk. What law governs these kinds of operations? For example, can one country rely on intelligence produced by another country without verifying the means by which the intelligence was produced or its veracity? What rules may be found in international human rights law that may constrain abuses of power produced in the course of joint intelligence operations? Can countries sign “no spy” agreements whereby they commit not to spy on each other? Can country sign agreements whereby they commit to spy on each other? These questions will be explored in this class which will focus on two case studies: intelligence sharing in the fight against terrorism and intelligence sharing in the context of the ongoing Russian war of aggression against Ukraine.

Required Readings:

Provided in Student Packet

- [Interim Agreement Between the United States and the Union of Soviet Socialist Republics on Certain Measures With Respect to the Limitation of Offensive Arms](#) (May 26, 1972) (read Article V).
- [Memorandum of Understanding Between the National Security Agency/Central Security Service and the Israeli SIGINT National Unit Pertaining to the Protection of US Persons](#) (as leaked on Sep. 11, 2013)

Provided through Courseworks

- Ashley Deeks, [No “No Spy” Agreements?](#), Lawfare (Feb. 13, 2014).
- Ken Dilanian, [Biden Administration Walks a Fine Line on Intelligence-Sharing with Ukraine](#), NBC NEWS, (Mar. 4, 2022).
- Ashley S. Deeks, [Intelligence Services, Peer Constraints, and the Law](#), in GLOBAL INTELLIGENCE OVERSIGHT: GOVERNING SECURITY IN THE TWENTY-FIRST CENTURY 3–36 (Zachary K. Goldman & Samuel J. Rascoff, 2016).

-Syllabus is updated as of 11/2 and subject to further change-

- Privacy International, [*Minimum safeguards on intelligence sharing required under international human rights law, A report to the UN Counter-Terrorism Committee Executive Directorate*](#) (Nov., 2018).
- Marko Milanovic (read all four blog posts):
 - [*The International Law of Intelligence Sharing in Multinational Military Operations: A Primer*](#), EJIL: Talk! (Oct. 21, 2021).
 - [*The International Law of Intelligence Sharing in Multinational Military Operations: Framing Complicity*](#) (Oct. 22, 2021).
 - [*The International Law of Intelligence Sharing in Multinational Military Operations: State Fault in Complicity*](#) (Oct. 25, 2021).
 - [*The International Law of Intelligence Sharing in Multinational Military Operations: Concluding Thoughts*](#) (Oct. 26, 2021).

Suggested Readings:

- Asaf Lubin, “[*We Only Spy on Foreigners*”: The Myth of a Universal Right to Privacy and the Practice of Foreign Mass Surveillance](#), 18 CHI. J. INT’L. L. 502 (2018).
- Scarlet Kim, Diana Lee, Asaf Lubin, & Paulina Perlin, [*Newly Disclosed Documents on the Five Eyes Alliance and What They Tell Us about Intelligence-Sharing Agreements*](#), LAWFARE (Apr. 23, 2018).
- Emma J Marchant, [*Intelligence Sharing and Ukraine: The Jus in Bello*](#), OPINIO JURIS Blog (May 13, 2022).
- Human Rights Watch, [*“No Questions Asked”*: Intelligence Cooperation with Countries that Torture](#) (June 2010).
- Hans Born, Ian Leigh, & Aidan Wills, [*Making International Intelligence Cooperation Accountable*](#), Geneva Centre for Security Sector Governance (Oct. 15, 2015).
- [*Call for Action: Regulate Intelligence Sharing*](#), Privacy International and International Network of Civil Liberties Organizations (INCLEO) (2018).
- Ashley Deeks, [*Confronting and Adapting: Intelligence Agencies and International Law*](#), 102 VA. L. REV. 599 (2018).
- Craig Forcese, [*The Collateral Casualties of Collaboration: The Consequence for Civil and Human Rights of Transnational Intelligence Sharing*](#), in INTERNATIONAL INTELLIGENCE COOPERATION AND ACCOUNTABILITY 73 (Hans Born, Ian Leigh, & Aidan Wills eds., 2011).

Week 11: Intelligence in War: From the Law of Targeting to the Law of Occupation

Wednesday (11/15)

In the ancient world war-chiefs relied on mysticism in developing their grand policies. These officeholders sought the help of oracles and soothsayers, calling on them to predict the outcomes of military manoeuvres. In modern warfare, the need for foresight has only increased. While Generals no longer turn to oracles, they continue to search for divine certainty amidst the tormenting fog of war. It is in this context, that Intelligence analysts have become our contemporary wartime prophets. In this class we will explore the role of intelligence in war. We will examine a number of cutting edge legal issues generated by the datafication of warfare, including: (1) state responsibility for faulty intelligence resulting in significant civilian casualties in wartime aerial strikes; (2) the rights and obligations of belligerent occupiers to utilize tools of surveillance in occupied territories; (3) the application of the human rights to privacy and data protection in times of armed conflict to constrain the use of surveillance

-Syllabus is updated as of 11/2 and subject to further change-

drones and biometric data collection; (4) the legal obligations of international organizations and courts in the collection of intelligence.

Required Readings:

Provided in Student Packet

- Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), 1125 U.N.T.S 3 (June 8, 1977) (Arts. 37, 46, 51, 52, 57).

Provided through Courseworks

- Asaf Lubin, [The Reasonable Intelligence Agency](#), 47 YALE J. INT'L L. 119 (2022) (**read only pages 120-142**).
- Omar Yousef Shehabi, [Emerging Technologies, Digital Privacy, and Data Protection in Military Occupation](#), in RIGHTS TO PRIVACY AND DATA PROTECTION IN TIMES OF ARMED CONFLICT (Russell Buchan & Asaf Lubin eds., 2022).
- American Society of International Law, [The International Law of Data Protection and the Responsibilities of Int'l Courts and Organizations](#), YouTube (June 15, 2022) (watch this hour-long panel).
- Marten Zwanenburg, [Biometrics and International Humanitarian Law](#), Articles of War (Oct. 28, 2021).
- [HANDBOOK ON DATA PROTECTION IN HUMANITARIAN ACTION](#), ICRC (Christopher Kuner & Massimo Marelli eds., 2nd ed., 2020) (**only skim this document**).
- [Berkeley Protocol on Digital Open Source Investigations: A Practical Guide on the Effective Use of Digital Open Source Information in Investigating Violations of International Criminal, Human Rights and Humanitarian Law](#), U.N. OHCHR (2022) (**read only pages 19-29**).

Suggested Readings:

- Rebecca Crootof, [War Torts](#), 97 N.Y.U L. Rev. 1063 (2022).
- Edward Millett, [Open-Source Intelligence, Armed Conflict, and the Rights to Privacy and Data Protection: Threats and Conceptual Challenges](#), SECURITY & HUM. RTS. MONITOR 1 (2023).
- John A. Gentry, [Intelligence in war: how important is it? How do we know?](#), 34 INTELLIGENCE & NAT'L SEC. 833 (2019).
- Ashley Deeks, [Predicting Enemies](#), 104 VA. L. REV. 1529 (2018).
- ICRC, [Artificial Intelligence and Machine Learning in Armed Conflict: A Human-Centred Approach](#), 102 IRRC 463 (2020).
- John C. Tramazzo, [Sabotage in Law: Meaning and Misunderstanding](#), ARTICLES OF WAR (June 23, 2023).
- Eliza Watt, [The Principle of Constant Care, Prolonged Drone Surveillance and the Right to Privacy of Non-Combatants in Armed Conflicts](#), in RIGHTS TO PRIVACY AND DATA PROTECTION IN TIMES OF ARMED CONFLICT (Russell Buchan & Asaf Lubin eds., 2022).

****Class on 11/22 is cancelled for Thanksgiving Break****

Week 12: Intelligence and the Law of State and Individual Responsibility

Wednesday (11/29)

What law is triggered after the intelligence operation has come to an end? What legal frameworks ensure transparency and accountability for transgressions that may have taken place during an intelligence operation? This class will begin to explore these sets of questions. First, we may discuss what “an end” actually means for intelligence operations. Given that spying is a never-ending circular loop of supply and demand between information gatherers and policy makers, where might one find potential exit points for ex-post review and assessment? When can we say definitively that an espionage operation has ceased? After resolving this matter, the class could proceed to discuss the law on state responsibility for internationally wrongful acts and its specific application in the context of intelligence gathering. In this regard, we may look to identify evidentiary requirements in an environment of enhanced secrecy where states can often claim plausible deniability. We may further look to questions of attribution and complicity as well as to the criminal and civil responsibility of individual intelligence professionals. We may also think about less formal mechanisms for quality control and accountability in espionage cases as well as broader process of education, memory and history-(re)telling as forms of post-espionage justice.

Required Readings:

Provided in Student Packet

- [ILC Articles on Responsibility of States for Internationally Wrongful Acts](#), UN Doc.A/CN.4/L.602/Rev.1 (2001), Arts. 1-27, 30-31, 34-37, 42, 45, 49-52, 55, 59.

Provided through Courseworks

- [Case of Husayn \(Abu Zubaydah\) v. Poland](#), App. No. 7511/13, European Court of Human Rights Judgment (Jul. 24, 2014), excerpted materials.
- [Al-Nashiri v. Poland](#), Judgement, Eur. Ct. H.R., App. No. 28761/11 (July 24, 2014), excerpted materials.
- SAM SELVADURAI, LAW, WAR AND THE PENUMBRA OF UNCERTAINTY: LEGAL CULTURES, EXTRA-LEGAL REASONING, AND THE USE OF FORCE, Chapter 3: Uncertainty About Facts in the *Jus Ad Bellum* (2022).
- SOPHIE DUROY, THE REGULATION OF INTELLIGENCE ACTIVITIES UNDER INTERNATIONAL LAW (forthcoming, 2023), excerpted materials.
- OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, [A GUIDE TO CYBER ATTRIBUTION](#) (Sept. 14, 2018).

Suggested Readings:

- Dieter Fleck, [Individual and State Responsibility for Intelligence Gathering](#), 28 MICH. J. INT’L. L. 687 (2007).
- William Banks, [Cyber Attribution and State Responsibility](#), 97 INT’L. L. STUD. 1039 (2021).

Week 13: The Ethical Spy: Just Intelligence and the Future of Espionage Regulation

Wednesday (12/6)

Is there a place for a complete reconceptualization of the international law of intelligence? The seminar will end with an opportunity to examine a new category-shifting perspective on the international regulation of espionage. This class will introduce students to a body of literature rooted in intelligence ethics and moral philosophy that has long proposed the application of “Just War Theory” to intelligence work or the application of related, yet distinct, concepts of intelligence ethics. This body of scholarship, known as “Just Intelligence”, and its variants, proposes a set of ethical tools and principles that could guide intelligence professionals at different stages throughout the intelligence cycle (from collection to dissemination). Can this ethical framework be translated into the language of international law? After all, remember that the International Court of Justice noted in the South West Africa Case (July 18, 1966) that a court of can only take account of moral principles “insofar as these are given sufficient expression in legal form.” In this class we will begin to explore whether these moral principles can be given such legal form, by imaging a new *lex specialis* of espionage law as a standalone subfield of examination.

Required Readings:

Provided in Student Packet

- Visualizations of Ethical Theories Around Espionage Regulation

Provided through Courseworks

- CÉCILE FABRE, *SPYING THROUGH A GLASS DARKLY: THE ETHICS OF ESPIONAGE AND COUNTER-INTELLIGENCE* (2022), excerpted materials.
- SIR DAVID OMAND & MARK PHYTHIAN, *PRINCIPLED SPYING: THE ETHICS OF SECRET INTELLIGENCE* (2018), excerpted materials.
- Seumas Miller, *Rethinking the Just Intelligence Theory of National Security Intelligence Collection and Analysis: The Principles of Discrimination, Necessity, Proportionality and Reciprocity*, 35 SOCIAL EPISTEMOLOGY 211 (2021).
- David Oman, *Examining the Ethics of Spying: A Practitioner’s View*, CRIMINAL LAW AND PHILOSOPHY (2023).

Suggested Readings:

- DARRELL COLE, *JUST WAR AND THE ETHICS OF ESPIONAGE* (2014)
- John B. Chomeau & Anne C. Rudolph, [Ethical “Need to Know” For Intelligence Officers](#), CIA (1986).
- Sir David Omand & Mark Phythian, [Ethics and Intelligence: A Debate](#), 26(1) INT’L J. INTELLIGENCE & COUNTERINTELLIGENCE 38 (2006).
- Angela Gendron, [Just War, Just Intelligence: An Ethical Framework for Foreign Espionage](#), 18(3) INT’L J. INTELLIGENCE & COUNTERINTELLIGENCE (2005).
- William E. Colby, [Public Policy, Secret Action](#), 3 ETHICS AND INT’L AFF. 61 (1989).
- James A. Barry, [Managing Covert Political Action: Guideposts from Just war Theory](#), 36(2) STUD. INTEL. 19 (1992).
- Michael Quinlan, [Just intelligence: Prolegomena to an ethical theory](#), 22(1) INTELLIGENCE & NAT’L SEC. 1 (2007).
- Raphael Bitton, [The Legitimacy of Spying Among Nations](#), 29 Am. U. Int’l. L. Rev. 1009 (2014).