



# From AFIO's THE INTELLIGENCER

JOURNAL OF U.S. INTELLIGENCE STUDIES

VOLUME 23 • NUMBER 1 • \$15 SINGLE COPY PRICE Summer 2017 ©2017, AFIO

## GUIDE TO THE STUDY OF INTELLIGENCE

### Intelligence Collection, Covert Operations, and International Law

by Ernesto J. Sanchez

#### Introduction

U S intelligence officers are trained to abide by the law – American law. But does that mean that they, or for that matter, other countries’ intelligence officers trained to follow their countries’ laws can otherwise just do whatever they need or want to accomplish their missions?

Intelligence is the process by which specific types of information important to national security are requested, collected, analyzed, and provided to policymakers. This process entails safeguarding such information by counterintelligence activities and carrying out related operations as requested by lawful authorities.<sup>1</sup>

There are five main ways of collecting intelligence that are often collectively referred to as “intelligence collection disciplines” or the “INTs.”<sup>2</sup>

- Human intelligence (HUMINT) is the collection of information from human sources. The collection may occur openly, as when FBI agents interview witnesses or suspects, or it may be done through clandestine means (espionage), such as when CIA officers interview human assets.
- Signals intelligence (SIGINT) refers to electronic transmissions collected by ships, planes, ground sites, or satellites. Communications intelligence (COMINT) is a type of SIGINT entailing the interception of communications between two parties.

1. Mark Lowenthal, *Intelligence: From Secrets To Policy*, 4th ed. (Washington, DC: CQ Press, 2008), 7-8.

2. For a detailed discussion of the various intelligence collection disciplines see Robert M. Clark, “Perspectives on Intelligence Collection,” *The Intelligencer* 20 (2), Fall/Winter 2013; also on the web at [http://www.afio.com/40\\_guide.htm](http://www.afio.com/40_guide.htm).

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- Imagery intelligence (IMINT) is sometimes also referred to as photo intelligence (PHOTINT) and can also be collected by ships, planes, ground sites, or satellites.
- Measurement and signatures intelligence (MASINT) is a relatively little-known collection discipline that concerns weapons capabilities and industrial activities. MASINT includes the advanced processing and use of data gathered from overhead and airborne IMINT and SIGINT collection systems. Telemetry intelligence (TELINT) is sometimes used to indicate data relayed by weapons during tests, while electronic intelligence (ELINT) can indicate electronic emissions picked up from modern weapons and tracking systems. Both TELINT and ELINT can qualify as SIGINT and contribute to MASINT.
- Open source intelligence (OSINT) refers to a broad array of information and sources that are publicly available, including information obtained from the media (newspapers, radio, television, etc.), professional and academic records (papers, conferences, professional associations, etc.), and public data (government reports, demographics, hearings, speeches, etc.).<sup>3</sup>

All these collection disciplines have potential implications for international law – the rules and principles of general application, defined by treaties and international custom, dealing with the conduct of states and international organizations and with their relations among themselves, as well as states’ relations with individual persons.<sup>4</sup>

For example, how can intelligence collection or other operations comply with international law? Do certain operational methods violate international law? What safeguards have policymakers put into place to ensure intelligence operations comply with international law? How do policymakers balance the risks of violating international law with national security priorities?

These questions evidence how policymakers worry about whether international law prohibits particular intelligence operations or aspects thereof. How these concerns apply also has much to do with the type of activities an intelligence operation entails, where that operation actually takes place, and the surrounding circumstances. This article describes some of the major international legal issues surrounding

3. Ibid.

4. Restatement of the Law, The Foreign Relations Law of the United States, § 101 (1987).

intelligence collection and a more controversial function of intelligence agencies – covert actions.

## Intelligence Collection

Intelligence collection implicates six aspects of international law: (1) norms of non-intervention, (2) principles surrounding diplomatic and consular relations, (3) human rights obligations governing the interrogation of human assets or criminal suspects under hostile circumstances, (4) law surrounding the clandestine surveillance of communication or conduct by electronic or other means, (5) arms control treaties, and (6) intelligence-sharing agreements.

**SOVEREIGNTY AND NONINTERVENTION.** Article 2(4) of the UN Charter mandates that all member states “shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state...”<sup>5</sup> Article 51 of the UN Charter, however, mandates that nothing “shall impair the inherent right of individual or collective self-defense if an armed attack occurs.”<sup>6</sup> In that respect, espionage and accompanying operations conducted as preparation for an armed attack likely qualify as part of an unlawful threat or use of force, as well as a breach of obligations to not intervene in the affairs of other states. But espionage and accompanying operations conducted in self-defense, or with the permission of an affected state, probably do not.

**DIPLOMATIC AND CONSULAR RELATIONS.** Most espionage in the form of HUMINT collection abroad is conducted by intelligence officers working under diplomatic cover in their countries’ embassies. Arguably, the clandestine collection of human or electronic intelligence (e.g., a National Security Agency listening post at an embassy) falls outside of traditional diplomatic functions as defined by the Vienna Convention on Diplomatic Relations (VCDR).<sup>7</sup> But, as Professor Craig Forcese of Canada’s University of Ottawa has noted, “[t]here is ... no need for precise definition of proper diplomatic functions where states retain the discretion to, in essence, define these functions according to their own standards,” as well as expel individuals with diplomatic immunity who violate those standards.<sup>8</sup> As a result, international law governing diplomatic relations implicitly acknowledges

5. UN Charter art. 2(4).

6. UN Charter art. 51.

7. See generally Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95, art. 29.

8. Craig Forcese, “Spies Without Borders: International Law and Intelligence Collection” 5, *Journal of National Security Law and Policy*, 2011, 179, 201.

the tradition of intelligence collection by individuals operating under diplomatic cover.

## HUMAN INTELLIGENCE AND INTERROGATION.

The interrogation of hostile individuals has figured prominently in the post-9/11 debate over how far counterterrorism measures should go. In this respect, Article 9 of the International Covenant on Civil and Political Rights (ICCPR) prohibits arbitrary arrest and detention – any person “deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”<sup>9</sup> Moreover, Article 7 of the ICCPR mandates that “no one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment.”<sup>10</sup>

According to Article 1 of the UN Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (UN Torture Convention), torture constitutes any act “by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person” for specified purposes. These purposes are (1) obtaining from a person or a third person information or a confession, (2) punishing the person for an action s/he or a third person have committed or are suspected of having committed, (3) intimidating or coercing the person or a third person, or (4) discrimination of any kind.<sup>11</sup> In turn, decisions of international tribunals and national courts have concluded that, for ICCPR purposes, individuals may come within a state’s jurisdiction when those individuals are within the effective control of the state, even if not on the state’s actual territory.<sup>12</sup> The ICCPR and the UN Torture Convention are thus the reason why so much debate has taken place ever since the 9/11 attacks in the media and in the courts about what exactly constitutes torture or cruel, inhuman, or degrading treatment or punishment (e.g., waterboarding), especially in regard to CIA renditions of terrorism suspects to “black sites” abroad for “enhanced interrogation.”<sup>13</sup>

9. International Covenant on Civil and Political Rights art. 9, Dec. 16, 1966, 999 U.N.T.S. 171.

10. *Ibid.* art. 7.

11. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, S. Treaty No. Doc. 100-20 (1988), 1465 U.N.T.S. 85.

12. See, e.g., Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. 136, para. 111, July 9, 2004. “[T]he Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.”

13. See generally Jane Mayer, *The Dark Side: The Inside Story Of How The War On Terror Turned Into A War On American Ideals*. (New York City: Anchor Books, 2009).

**SURVEILLANCE.** Article 17 of the ICCPR mandates: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home, or correspondence, nor to unlawful attacks on his honor or reputation....”<sup>14</sup> As Forcese notes, then, “electronic surveillance of communications or surveillance that amounts to intrusions into the ‘home’ (including the place of work) must be authorized by law and by the appropriate official, on a case-by-case basis, and be reasonable under the circumstances.”<sup>15</sup> For domestic intelligence collection, those circumstances are usually determined by domestic law (e.g., the Fourth Amendment to the US Constitution and surrounding jurisprudence, European privacy law for domestic intelligence collection by European security services).

But with regard to surveillance, whether the ICCPR protects human targets abroad remains a subject of debate.<sup>16</sup> Indeed, the UN Convention on the Law of the Sea does not prohibit intelligence collection by ships operating outside states’ territorial waters (i.e., beyond twelve nautical miles from a state’s coastline).<sup>17</sup> Neither does the Outer Space Treaty prohibit intelligence collection by orbiting satellites.<sup>18</sup> Nor does the International Telecommunications Convention explicitly prohibit the interception of electronic communications.<sup>19</sup> The issues surrounding the National Security Agency’s controversial eavesdropping on German Chancellor Angela Merkel’s phone calls could consequently be more political than legal.

**ARMS CONTROL AND INTELLIGENCE SHARING.** President Ronald Reagan adopted as a signature phrase the Russian proverb “trust, but verify” when discussing arms control issues with the Soviet Union. One might consequently argue that intelligence collection amounts to investigating whether international law has been violated. For example, the Anti-Ballistic Missile Treaty and SALT I Agreement, providing for

“national technical means of [treaty compliance] verification” and in conjunction with other arms control accords, “effectively establish a right to collect intelligence, at least with respect to assessing compliance with the arms control obligations.”<sup>20</sup> Such intelligence-sharing arrangements as the “five eyes” relationship between the signals intelligence agencies of the US, UK, Canada, Australia, and New Zealand may also “evidence customary norms for what constitute acceptable forms of espionage.”<sup>21</sup>

## Covert Action

What intelligence agencies are probably best known for – covert action – can entail intelligence collection. But covert action usually involves much more as a policy tool used to pursue a geopolitical and national security goal or as “an activity...to influence political, economic, or military conditions abroad, where it is intended that the role of the [sponsoring government] will not be apparent or acknowledged publicly.”<sup>22</sup> Covert action may include:

- **Covert support of friendly governments.** In the wake of open or secret alliances with foreign governments that share common policy objectives, covert action can be limited to such measures as sharing intelligence with the government’s own security service on groups in the government’s country who would foment political unrest.
- **Covertly influencing the perceptions of a foreign government or population regarding US policy goals.** The “simplest and most direct method” of affecting a foreign government’s actions is to use agents of influence – well-placed individuals who persuade colleagues to adopt policies “congenial to another government’s interests.” Moreover, intelligence agencies can disseminate information (or disinformation) to enhance a foreign population’s backing for a policy objective.
- **Covert support of non-governmental forces or organizations.** If a government wishes to weaken one of its hostile counterparts, material support can be provided to opposing political parties, civic groups, labor unions, media, and even armed insurgent groups.

14. Supra note 8, art. 17.

15. Forcese, supra note 6, at 196.

16. See Ryan Goodman, “UN Human Rights Committee Says ICCPR Applies to Extraterritorial Surveillance: But is that so novel?,” *Just Security*, March 27, 2014, available at <http://justsecurity.org/8620/human-rights-committee-iccppr-applies-extraterritorial-surveillance-novel/>.

17. See United Nations Convention on the Law of the Sea arts. 3, 19(2)(c), opened for signature Dec. 10, 1982, 1833 U.N.T.S. 397.

18. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies art. II, done Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 (“Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.”).

19. International Telecommunication Convention art. 22, done Oct. 25, 1973, 28 U.S.T. 2495, 1209 U.N.T.S. 255 (providing that states “reserve the right to communicate [international telecommunications] correspondence to the competent authorities in order to ensure the application of their internal laws or the execution of international conventions to which they are parties”).

20. Simon Chesterman, “The Spy Who Came In from the Cold War: Intelligence and International Law,” 27 *Michigan Journal of International Law* 27, 2006, 1071-1091.

21. Ibid. at 1093-98.

22. 50 U.S.C. 2093(e).

- **Support for coups.** Support can also be extended to groups seeking to outright overthrow a hostile government. For example, in 1953, the US, in partnership with the UK and the shah of Iran, orchestrated a coup to overthrow Mohammed Mossadegh, Iran's democratically-elected prime minister, who had nationalized his country's oil industry, doing great harm to British economic interests. And, in 1954, the US orchestrated the military overthrow of the Guatemalan government to prevent the establishment of a perceived "Soviet beachhead" in Central America and to protect US economic interests in the country.
- **Paramilitary operations.** Governments can also train irregular forces to launch insurgencies against hostile governments, though, in practice, these types of operations are unlikely to remain secret. US support in the 1980s for the mujahedeen struggle against Afghanistan's Soviet-backed government and the contra rebels' efforts against Nicaragua's Soviet-backed government best exemplify this type of covert action.
- **Lethal actions.** Covert action can also take the form of acts of violence directed against specific individuals, such as the assassination of key foreign political figures or property. Sustained lethal action operations in armed conflicts, such as the US unmanned aerial vehicle ("drone") strikes against terrorism suspects in Pakistan, Yemen, and Somalia, can also be carried out in partnership with special forces personnel.<sup>23</sup>

The more aggressive a covert action conducted without the affected state's consent is, the greater the likelihood that it will, if made public, raise charges that international law has been violated.

**SOVEREIGNTY AND COVERT ACTION.** The 1986 International Court of Justice (ICJ) decision in the case of Military and Paramilitary Activities in and against Nicaragua thus bears much significance due to its implications for covert actions conducted to destabilize affected states' governments. The court decided that the US had breached Nicaraguan sovereignty by (1) training, arming, equipping, and financing the contra rebel movement in the conduct of activities against the Nicaraguan government; (2) coordinating specified paramilitary attacks on Nicaraguan territory; (3) directing certain overflights of Nicaraguan territory; and (4) laying mines in Nicaraguan territorial waters.<sup>24</sup> While ICJ decisions have no binding effect in

a *stare decisis* (i.e., precedent governs) sense,<sup>25</sup> the Nicaragua decision arguably has the effect of prohibiting the type of covert action the US conducted in similar circumstances.<sup>26</sup>

Still, no consensus has arisen among the global intelligence and policy community as to what makes a proactive covert operation a violation of international law, especially because such compliance questions are inevitably very fact-specific. In this regard, Yale University Law School Professor W. Michael Reisman and Chief Judge James Baker of the US Court of Appeals for the Armed Forces have proposed the following test: (1) whether a covert action promotes such basic UN Charter policy objectives as self-determination; (2) whether it adds to or detracts from minimum world order; (3) whether it is consistent with contingencies authorizing the overt use of force; (4) whether covert coercion was implemented only after plausibly less coercive measures were tried; and (5) whether the covert action complied with such international humanitarian law requirements as necessity, proportionality, and distinction.<sup>27</sup>

The latter inquiry, which concerns the law of armed conflict, has been especially significant with regard to such lethal actions as the previously mentioned drone strikes in Pakistan, Yemen, and Somalia, and the 2011 raid in Pakistan resulting in the killing of Osama bin Laden. An intelligence agency like the CIA can team up with military personnel (i.e., special forces) to plan and execute such missions where, for example, a host government does not wish to acknowledge receiving assistance from the US.<sup>28</sup> The planning of such missions must take into account their necessity for attaining a greater policy goal, whether the harm caused to civilians or civilian property is proportional and not excessive in relation to the concrete and direct military advantage anticipated by the operation, as well as distinguish between combatants and civilians.<sup>29</sup>

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25. Statute of the International Court of Justice art. 59.

26. See Robert Williams, "(Spy) Game Change: Cyber Networks, Intelligence Collection, and Covert Action," 79 *George Washington University Law Review* 103, 2011, 1162-1179. "To the extent the state claiming self-defense is invoking it as a collective right, the decision of the International Court of Justice in NICARAGUA v. UNITED STATES may have limited the availability of such claims to cases of force used in response to an armed attack."

27. W. Michael Reisman & James E. Baker, *Regulating Covert Action: Practices, Contexts, and Policies of Covert Coercion Abroad in International and American Law* 77, 1992.

28. See Robert Chesney, "Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate," *Journal of National Security Law and Policy* 5 (539), 2012, 539-629.

29. See Harold H. Koh, Legal Adviser, U.S. Department of State, "The Obama Administration and International Law, Remarks at the Annual Meeting of the American Society of International Law," March 25,

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23. See generally Abram Shulsky and Gary Schmitt, *Silent Warfare: Understanding the World of Intelligence*, 75-98 (2002).

24. 1986 I.C.J. 14, paras. 75-125, 172-269 (June 27).

**LETHAL ACTIONS OR ASSASSINATION.** Readers may question whether such lethal operations conducted by the US comport with the executive prohibition on assassinations, enacted in 1981 following scandals over past CIA connections – actual and alleged – to assassination attempts against such anti-US world leaders as Cuba's Fidel Castro.<sup>30</sup> As one well-known government memorandum concludes, peacetime assassination encompasses – no more – the murder of a private individual or public figure for political purposes. Assassination is unlawful killing, and would be prohibited by international law even if there was no executive order proscribing it. But “the clandestine, low visibility or overt use of military force against legitimate targets in time of war, or against similar targets in time of peace where such individuals or groups pose an immediate threat to United States citizens or the national security of the United States, as determined by competent authority, does not constitute assassination or conspiracy to engage in assassination.”<sup>31</sup> In other words, the killing of Saddam Hussein, if one believes that the invasion of Iraq was not a continuation of the 1991 Persian Gulf War, would have constituted an unlawful assassination. But the killing of Saddam Hussein as supreme commander of the Iraqi armed forces during the invasion of Iraq, to the extent that he even wore a military uniform, probably would have been lawful.

## Conclusion

So why do states continue to conduct intelligence collection and covert operations that arguably violate international law? These operations need not violate international law and can take place legally, albeit secretly. But the reality remains that the international legal system is largely decentralized, lacking the sorts of integrated enforcement mechanisms inherent in national legal systems. There is no global executive, legislature, judiciary, police, military, or paramilitary force that can take action against states that violate treaty obligations or other international law.

The US and the four other permanent members of the UN especially find themselves in advantageous positions with regard to this situation because of their

ability to veto measures like diplomatic or economic sanctions or multilateral military force that could otherwise “enforce” against international law violations. But a country that respects the rule of law will do its best to make attempts at ensuring its intelligence efforts comply with international law, even though there is a relative paucity of such law to govern such efforts. 

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