Towards Intelligent Self-Defence:

Bringing Peacetime Espionage in From the Cold and Under the Rubric of the Right of Self-Defence

Ian H Mack
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# CONTENTS

I  INTRODUCTION .................................................................3

II  THE TRADITIONAL LEGAL ARCHITECTURE OF ESPIONAGE .................................................................6

A  Key Terms and Scope .................................................................................6

B  Legal Architecture .................................................................................6
  1 Espionage in Wartime ...........................................................................8
  2 Espionage in Peacetime .........................................................................11
    (a) The ‘Lotus Presumption’ .................................................................13
    (b) Peacetime Espionage is a Violation of State Sovereignty and the Customary Norm of Non-Intervention .................................................................14

III  THE MODERN SECURITY ENVIRONMENT ..........................16

A  The Fog of Peace: Challenges to the Traditional Security Environment and Law of War Architecture .................................................................17

B  Situating Espionage Within this Modern Peacetime Environment .................................................................21

IV  A RIGHT OF ‘INTELLIGENT SELF-DEFENCE’ ........27

A  The Right of Self-Defence .........................................................................27

B  Extending the Right of Self-Defence .........................................................28

C  A Right to Conduct Espionage Incidental or Ancillary to the Right of Self-Defence .................................................................34
  1 Should a Right to Conduct Espionage Incidental or Ancillary to the Right of Self-Defence Develop? .................................................................35
    (a) Espionage Leads to a More Informed Invocation of the Right of Self-Defence by Helping to Assess ‘Necessity’ .................................................................37
    (b) Espionage Would Lead to a More Efficient and ‘Proportionate’ Exercise of the Right of Self-Defence .................................................................38
  2 Could an Incidental or Ancillary Right Develop? .................................................................40
    (a) Is an ‘Incidental’ or ‘Ancillary’ Right a Workable Concept in International Law? .................................................................40
    (b) Moving From Tolerance to Justification of Peacetime Espionage .................................................................43
  3 What Practical and Legal Ramifications Would Flow? .................................................................44
    (a) Practical Ramifications .................................................................44
    (b) Legal Ramifications .................................................................47

V  A WAY FORWARD? ..................................................................................49

A  An International Treaty ...........................................................................50

B  Recommendatory Guidelines ....................................................................51

C  Customary Law .......................................................................................53

VI  CONCLUSION .......................................................................................54

BIBLIOGRAPHY ........................................................................................56
I INTRODUCTION

“I don’t think they play at all fairly,” Alice began, in a rather complaining tone … “and they don’t seem to have any rules in particular; at least, if there are, nobody attends to them — and you’ve no idea how confusing it is…”

Lewis Carroll, *Alice’s Adventures in Wonderland*

Espionage is a unique creature in international law. Practised throughout history, the world’s ‘second oldest profession’\(^1\) has long been acknowledged as a vital tool of statecraft, employed to achieve self-interested goals. Its occurrence is a ‘matter of practical reality’.\(^2\) Yet, surprisingly, given its prolific practice, espionage has largely eluded explicit international legal regulation.

Presently, the only rules of international law that explicitly contemplate espionage arise in the context of conventional, ‘clear-cut’ wartime within the rubric of *jus in bello*. The law of armed conflict has developed fairly consistent principles that suggest belligerents are entitled to spy on each other but that captured spies are not immune from the operation of a violated state’s domestic law. However, international law appears agnostic towards espionage in times of peace.

Conventional approaches to espionage developed in a security context that is unrecognisable today, reliant on traditional distinctions that are increasingly tested in

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1 Lewis Carroll, *Alice’s Adventures in Wonderland* (Macmillan, 1865).
the modern security environment. Importantly, the effects of this new security era on
the architecture of the law of war and use of force arguably provide an opportunity to
begin to develop international law’s recognition of peacetime espionage.

In an attempt to bring greater synthesis between espionage, international law,
international relations and the modern security environment, this paper will examine
the need and the capability for international law to finally contemplate peacetime
espionage as it is practised today. Helping to rectify the paucity of existing literature,
it will analyse how the legal framework surrounding peacetime espionage could be
adapted to more appropriately reflect the modern context in which it is practised. At
its heart, this paper is underscored by a central question: given the multiplicity of
threats facing modern states, should peacetime espionage, in certain circumstances
outside of a war context, be sanctioned under international law?

This paper argues specifically that there should be, and indeed could be, an
ancillary or incidental right to conduct peacetime espionage in certain contexts within
the extended rubric of the right of self-defence. The intelligence produced by
espionage on the location, status and imminence of shifting threats and armed attacks
directly underpins the lawful invocation and effective exercise of any right of pre-
emptive or anticipatory self-defence. There is scant international literature proposing
any such ‘ancillary’ or ‘incidental’ power in international law, which makes this
proposal an innovative one. International law should not continue to be apathetic
towards something so widely practised and so vital to the functioning of international
relations, if it is to remain a legitimate authority regulating the interactions between
states. Peacetime espionage needs to finally be brought in from the cold and be
recognised, albeit in a limited way, by international law.
Due to the clandestine nature of espionage and the limited case law that exists, this is inherently a conceptual exploration, and is intended to provoke further academic discussion on the international lawfulness of espionage. Those writing about espionage face the problem that great volumes of relevant information are kept confidential. Moreover, because of their very nature, the few cases that do arise inherently involve failed acts of espionage. Thus, this paper will necessarily contemplate hypotheticals and a limited selection of case studies. Additionally, espionage gives rise to a multiplicity of related legal issues, most prominently concerning the treatment of captured spies and issues of state responsibility. Such questions inevitably colour any legal analysis of espionage. However, this paper must, for the sake of brevity, be confined to the issue of the legality of peacetime espionage as traditionally understood as a practice of states.

This paper will proceed in the following parts. Part II will outline and analyse the traditional legal architecture and normative framework relating to wartime and peacetime espionage. Part III will explore how the modern security environment challenges traditional law of war architecture and conceptual distinctions of security and conflict. It will reveal that there is a lack of synthesis between modern peacetime espionage and international law’s traditional blindness to the practice. It will argue there is a need for international law to finally contemplate peacetime espionage. Part IV will seek to accommodate peacetime espionage within the rubric of self-defence by analysing the law and rationale behind extended doctrines of self-defence. It will argue that, by logical extension, peacetime espionage is capable of being justified as an ancillary or incidental right to the right of self-defence. Part V will then provide a brief commentary on the utility of this argument and the possible prescriptions for the development of academic discussion and international law.
II THE TRADITIONAL LEGAL ARCHITECTURE OF ESPIONAGE

A Key Terms and Scope

The term ‘espionage’ is used narrowly in this paper, excluding tangential conduct such as sabotage, covert action, paramilitary activities and domestic surveillance. It is limited to the conventional conception of a human agent engaging in territorially-intrusive intelligence collection in another state. Espionage is the ‘consciously deceitful collection of information, ordered by a government … accomplished by humans unauthorized by the target to do the collection’.4 Traditional definitions view espionage as essentially a state-to-state act targeting government or military assets,5 although Parts III and IV will expose flaws in such a restriction. ‘Intelligence’ entails a broader concept and, for the purposes of this paper, is the product of the analysis of raw information collected through espionage.6 For the sake of brevity, this paper does not examine aspects of cyber espionage and other technologically-based practices of intelligence collection.

B Legal Architecture

There is no general norm or rule of international law that directly prohibits espionage. Indeed, the defining feature of espionage is its lack of legal control.7 Espionage — like the agents that practise it — operates in the shadows of international law, existing ‘between the tectonic plates of legal systems’.8 Touching upon espionage somewhat

6 Forcese, above n 5, 181.
indirectly, international rules affecting spying are aptly described as a ‘checkerboard of principles’. With no clear answer to the question of the legality of state espionage, international law has only ever contemplated espionage under the rubric of *jus in bello*. The resulting ‘murkiness’ has meant states have legislated domestically to prohibit and deter espionage within their borders.

A conventional, ‘clear-cut’ wartime-peacetime dichotomy was fundamental to the development of the international legal architecture of espionage. The legal and normative views on espionage developed in an era when states made formal declarations of war and faced each other on the battlefield in front lines. Historical instruments of international humanitarian law required a declaration of war before their terms commenced operation. Now, of course, an ‘armed conflict’ within the meaning of the *Geneva Conventions* arises in all cases of declared war, as well as armed conflicts between two state parties, even if the state of war is not recognised by one of them. The International Criminal Tribunal for the Former Yugoslavia has found that ‘an armed conflict exists whenever there is resort to armed force between states or protracted armed violence between governmental authorities and organised

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9 Forcense, above n 5, 209.  
10 Williams, above n 3, 1165.  
13 See Jean Pictet, *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (International Committee of the Red Cross, 1952) 32.
armed groups or between such groups within a state’. The triggering factor of the existence of an armed conflict animates the *jus in bello* rules relating to espionage.

1 **Espionage in Wartime**

The legality of espionage in wartime is fairly well established in international law, and the laws of war dealing with wartime espionage remain broadly consistent. Wartime espionage is a recognised ruse of warfare not prohibited by any treaty or customary norm. Territorially penetrative intelligence collection is permitted during armed conflict because of the ‘absence of any general obligation of belligerents to respect the territory or government of the enemy state’.

The early documents of international war law recognised the capacity of states to conduct wartime espionage. They provided the foundation for the *Hague Conventions*, which, uniquely among instruments of international humanitarian law, explicitly identify espionage as a permissible ruse of war (while other instruments simply allow ruses of war generally, and carve out no exception for ruses relating to intelligence gathering). There is scholarly consensus that spying is consistent with the law of armed conflict. Numerous national military manuals and codes reflect the

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14 *Prosecutor v. Dusko Tadic (Decision on the Defence Motion for the Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No. IT-94-1-AR72, 2 October 1995) [70] (Judges Cassese, Li, Deschenes, Abi-Saab, Sidhwa).
15 *Forcese, above n 5, 202.*
position of the *Hague Conventions* that covert intelligence collection is legitimate during armed conflict.¹⁹

Article 31 of the *Hague Convention (IV)* provides further evidence of the legitimacy of wartime espionage. It states that soldier spies who are captured after re-joining their forces incur no responsibility for their previous acts of espionage;²⁰ they are afforded prisoner-of-war status akin to any other lawful combatant. Baxter claims that this provision indicates that, whilst threats of punishment are designed to deter spying, the fact that it is limited in operation proves that spying is a legitimate ruse of war.²¹ Furthermore, under the *Hague* framework the fate of captured spies is determined by the domestic laws of a violated state. Whilst those who are caught engaging in acts of espionage are not afforded prisoner-of-war status and potentially face the death penalty,²² the severe punishments imposed on a spy ‘[do] not make his act, which international law authorizes and warrants, an illegitimate act’.²³ Instead,

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such domestic punishments are justified by the danger which espionage poses to a
state and the need for deterrence.\textsuperscript{24}

The \textit{Geneva Conventions} did little to alter the \textit{Hague} framework, merely
extending safeguards for the treatment of captured spies.\textsuperscript{25} The \textit{Protocol Additional to
the Geneva Conventions}\textsuperscript{26} effectively reaffirmed the laws of war as outlined in the
\textit{Hague} and \textit{Geneva Conventions},\textsuperscript{27} reinforcing that wartime spying is not
internationally prohibited.\textsuperscript{28} Instead, domestic punishment acts as a deterrent to
discourage the practice.

What emerges from this state-centric framework is that in wartime states can
send spies ‘without attracting opprobrium’.\textsuperscript{29} The law mainly focuses upon
determining who is, and who is not, a spy and whether or not they are entitled to
prisoner-of-war status. Although spies in armed conflict do not violate the law of
war,\textsuperscript{30} they receive no privileged status under the law of war. As Solis concludes,
spies, ‘although engaging in acts not considered unlawful, are considered unlawful
combatants’\textsuperscript{31}.

\textsuperscript{24} Baxter, above n 21, 329. See also Anderson, above n 18, 15.
\textsuperscript{26} \textit{Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of
Victims of International Armed Conflicts (Protocol I)}, opened for signature 8 June 1977, 1125 UNTS 3
(entered into force 7 December 1979); \textit{Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)},
opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978).
\textsuperscript{27} See, eg, \textit{Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the
Protection of Victims of International Armed Conflicts (Protocol I)}, opened for signature 8 June 1977,
1125 UNTS 3 (entered into force 7 December 1979) art 46(4).
\textsuperscript{28} Yves Sandoz et al (eds), \textit{Commentary on the Additional Protocols of 8 June 1977 to the Geneva
Conventions of 12 August 1949} (Martinus Nijhoff, 1987) 564.
\textsuperscript{29} Cooke, above n 7, 618.
\textsuperscript{30} Quincy Wright, ‘Espionage and the Doctrine of Non-Intervention in Internal Affairs’ in Roland J
See also Sandoz et al, above n 28, 470. But see \textit{Ex parte Quirin}, 317 US 1, (1942).
\textsuperscript{31} Gary D Solis, \textit{The Law of Armed Conflict: International Humanitarian Law in War} (Cambridge
University Press, 2010) 430.
2 Espionage in Peacetime

Peacetime espionage has traditionally held a far more equivocal position in international law. States have approached the question of peacetime espionage with a degree of ‘creative ambivalence’ and ‘artful ambiguity’. This has left international law ‘remarkably oblivious’ to its practice, providing no international doctrine and touching upon peacetime espionage only indirectly. Such blind spots are an undesirable feature for any system of law.

Peacetime espionage is neither censured nor condoned under international law; spies are neither prohibited nor protected. In the international sphere, it is dealt with politically, not legally. Peacetime espionage has ‘always been seen as an issue of domestic law, even though an international event is obviously involved’. Most domestic legal regimes perpetuate a double standard, where states which are the target of espionage missions punish captured spies for conduct in which they also engage.

From a Realist perspective, much of the reason for this state ambivalence is that international law surrounding espionage is a result of international power politics. Law has historically been epiphenomenal to national interests in international

32 Forcense, above n 5, 210.
33 Ibid 205.
34 Radsan, above n 8, 602.
36 Demarest, above n 4, 330.
security, and states resist entering into agreements that would restrict their freedom to act in their national interests.

The International Court of Justice (ICJ) has been reluctant to provide any opinion on the legality of espionage. It avoided a conclusive determination on the issue in Tehran Hostages. Iran did not present sufficient evidence for an opinion to be made on any alleged espionage. In any case, the Court noted the difficulty in discerning when lawful collection of information in the receiving state by diplomatic staff crosses into the realm of espionage or interference in internal affairs. This, the Court reconciled, was best dealt with by the receiving state, who has at all times the right to deem diplomats persona non grata and expel them.

The reluctance for international law to directly address peacetime espionage has left scholars to debate and contest its normative and legal outlines. The question often asked is given this lack of recognition, is peacetime espionage illegal under international law? A survey of the relevant literature reveals that there is no direct answer and a deep division in the academic literature.

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42 Ibid 85; Forcense, above n 5, 201.
45 Forcense, above n 5, 202; Radsan, above n 8, 602.
(a) The ‘Lotus Presumption’

The ‘Lotus presumption’ is a rule of international law that emerges from the landmark Lotus case, in which the ICJ held that states are free to engage in any conduct of their choosing in the absence of a rule of international law prohibiting such action. This positivist approach to international law grants states a wide measure of discretion in choosing how to conduct themselves on the international stage.

Accordingly, the lack of formal censure or treaty proscription might suggest that peacetime espionage is not to be presumed a breach of international law. Numerous commentators point to widespread state practice and a lack of explicit proscription in order to reject the proposition that espionage is internationally wrongful. Some scholars are more indecisive and consider peacetime espionage to be neither clearly prohibited nor endorsed, of ‘doubtful compatibility with the requirements of law governing the peaceful intercourse of states’, or neither legal nor illegal. Importantly, though, these scholars fail to appreciate the operation of the ‘Lotus presumption’, because in the absence of a rule rendering the conduct illegal, it is legal. That is the essence of the ‘Lotus presumption’.

46 The Case of the S.S. Lotus (France v Turkey) (Judgment) [1927] PCIJ Reports (ser A) No 10 (‘Lotus’).
48 Triggs, above n 40, 22.
53 Baxter, above n 21, 329.
54 See Radsan, above n 8, 605; Forcense, above n 5, 204; Daniel B Silver, ‘Intelligence and Counterintelligence’ in John Norton Moore and Robert F Turner (eds), National Security Law (Carolina Academic Press, 2nd ed, 2005) 935. See also Baker, above n 52, 1092.
(b) Peacetime Espionage is a Violation of State Sovereignty and the Customary Norm of Non-Intervention

The ‘Lotus presumption’ is the high-water mark of positivist international law,\(^{55}\) and although the ICJ has continued to apply it,\(^{56}\) it ‘no longer commands unqualified support’.\(^{57}\) Importantly, the framework of international law dictates the ‘scope and content of the independence of states’.\(^{58}\) Thus, even if it is not possible to point to a dedicated treaty or custom rule which directly prohibits peacetime espionage, there are strong grounds for considering this practice illegal under more sweeping rules of customary international law. Indeed, international law touches upon peacetime espionage indirectly through the norm of non-intervention. The attribute of ‘sovereignty’ is thus a double-edged sword, where the benefits of the ‘Lotus presumption’ are subject to the sovereign rights of other states. Accordingly, the conflict between sovereignty and spying can provide the greatest insight into the legality of peacetime espionage.\(^{59}\)

The concept of state ‘sovereignty’ lies at the core of international law,\(^{60}\) international order and stability. Indeed, the Lotus case also held that ‘the first and foremost restriction imposed by international law upon a state is that — failing the

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56 See Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Advisory Opinion) [2010] ICJ Reports 403, 26 [56]; Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, 247; Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v USA) (Merits) [1986] ICJ Rep 14, 135.
58 Shaw, above n 49, 212.
60 Forcese, above n 5, 185.
existence of a permissive rule to the contrary — it may not exercise its power in any form in the territory of another state’. 61 Sovereignty and territorial integrity were also recognised in Nicaragua 62 as fundamental peacetime principles of international law. 63 The customary principle 64 of non-intervention was formally codified within the Charter of the United Nations in Articles 2(4) and 2(7). These articles reflect the emphasis on international system stability in international law and international relations. 65 The Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations 66 provides authoritative interpretation of Article 2(4), 67 reaffirming the inviolability of the personality of the state. Likely a reflection of customary law, 68 this declaration has promoted the norm of peaceful cooperation and non-intervention.

By its very nature, territorially-intrusive peacetime espionage is a violation of these articles and customary principles. 69 Therefore, peacetime espionage may be deemed a violation of international law, which, while widely practised, remains a violation nonetheless. It can be recognised as unlawful and, according to Falk, it

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61 The Case of the S.S. Lotus (France v Turkey) (Judgment) [1927] PCIJ Reports (ser A) No 10, 18.
63 Ibid 6.
64 Ibid 534 (Judge Jennings).
67 Armstrong, Farrell and Lambert, above n 65, 119.
68 See Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v USA) (Merits) [1986] ICJ Rep 14, 202; Forcense, above n 5, 198.
might most accurately be viewed as tolerated, but illegal.\textsuperscript{70} Indeed, Wright concludes it is a ‘consistently practised illegal activity’.\textsuperscript{71}

Thus, historically, the key determinant of the legality of espionage is that in peacetime, unlike in wartime, there is an obligation to respect the sovereignty and territorial inviolability of another state. These rules, which normally underpin interstate relations, do not operate in wartime.\textsuperscript{72} This is of central importance to the residual discussion in this paper because the conventional legitimacy of espionage is, therefore, founded upon clear-cut divisions of war and peace between states. However, these divisions may not be so readily drawn anymore.

III THE MODERN SECURITY ENVIRONMENT

The key factors in determining whether particular acts of espionage are lawful — the norm of non-intervention and respect for sovereignty — are decisively affected by whether a state of armed conflict or peace exists. But contemporary ‘peacetime’ is unrecognizable from that which occurred a century ago. Part III situates ‘peacetime’ espionage within the modern security context in which it occurs on an unprecedented scale. It argues that the traditional ambivalent approach of international law is no longer sustainable in an era where the wartime-peacetime dichotomy is imperilled by evolving forms and methods of conflict, and ‘peacetime’ is increasingly tumultuous and characterised by shifting threats from both state and non-state actors. Within this unstable environment, peacetime espionage is a vital tool of statecraft and is practiced on scales, by methods and against targets not contemplated by those framing the


\textsuperscript{71} Wright, above n 30, 3.

\textsuperscript{72} Armstrong, Farrell and Lambert, above n 65, 122.
conventional legal architecture relating to espionage a century ago. Accordingly, it is argued that international law’s current approach to peacetime espionage in times other than ‘clear-cut’ war is out-dated and that there is a need and an opportunity for it to finally comprehend and contemplate this practice as it occurs today.

A The Fog of Peace: Challenges to the Traditional Security Environment and Law of War Architecture

The basic assumptions of the Westphalian system are facing challenges. The once dominant Realist conception of international relations, which shaped the development of this state-centric international legal architecture surrounding wartime and peacetime espionage, is overly simplistic in an era of complex power geometries consisting of state and non-state actors. International law needs to deal with evolving linkages and flows in the security complex it is intended to regulate. The modern security environment is vastly different to that which contextualised the formation of the minimalist legal architecture relating to espionage. It is characterised by constant states of alert towards fluid and shifting transnational security threats from states, failed and rogue states, and non-state actors. Non-traditional threats that include the proliferation of weapons of mass destruction and biological weapons, international terrorism and international criminal networks undermine old security paradigms and promote an increasingly ‘fluid mass of anarchy’. Indeed, the increased capacity of non-state actors to carry out destructive acts like the September 11, 2001 attacks, the 2004 Madrid train bombings, the 2002 and 2005 Bali


bombings, and the 2005 London bombings challenges ‘the traditional *modus operandi* of states, in which state sovereignty is supreme and threats are expected to derive from other states, not from sub-state actors’.

This ‘brave new world’ should inform our understanding of international law and institutions, especially as they relate to international security. In contrast to the Cold War, the ‘War on Terror’ is characterised by asymmetric conflict and lacks a rigid balance of power between sovereign equals. With the days of formal declarations of war between states are largely over, the new security terrain is constituted by escalating degrees of cross-border activity, and the involvement of both third states and non-state actors. International Law, *jus ad bellum* and *jus in bello* must now govern an ‘increasingly complex and sophisticated threat-based environment’.

This new era precipitates challenges to legal characterisations of armed conflict and what constitutes an event that triggers the application of *jus in bello*. Expansive constructions of armed conflict such as concepts of transnational-armed conflict blur the boundaries between traditional wartime and peacetime notions of international and internal armed conflict. For example, the United States Supreme Court’s 2006 decision in *Hamdan v Rumsfeld* held that the term ‘non-international armed conflict’ in Common Article 3 of the *Geneva Conventions* should extend

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77 Rishikof and Bratton, above n 74, 655.
78 Chesterman, above n 2, 1097.
80 Demarest, above n 4, 342.
beyond mere internal armed conflicts to any armed conflict which does not amount to international within the terms of Common Article 2.\textsuperscript{83} Consequently, cardinal principles of international law, including of non-intervention in the affairs of other states, must be upheld in an era of cross-border and transnational-armed conflicts that transcend territorial boundaries with ease.

The sanctity of peacetime is being disrupted, as states’ conduct casts doubt on historical rules regarding when the use of force against both state and non-state actors will be considered an unlawful violation of the norm of non-intervention. For example, states are extending the rubric of self-defence under Article 51 of the \textit{Charter of the United Nations} to pre-empt threats to their national security through military strikes on state and non-state actors. The progressive shadow war of drone strikes across Yemen and Northern Pakistan targeting individuals like Anwar al-Awlaki in September 2011\textsuperscript{84} exemplifies these evolving approaches to security and conflict. Consequently, the modern dynamics of combating terrorism are unsettling for conventional war law classifications. From such action the traditional compartmentalization of \textit{jus ad bellum} and \textit{jus in bello} is being tested by measures of self-defence that involve targeted and isolated strikes.\textsuperscript{85} There are also new actors involved in conflict zones, including private military contractors and multinational corporations,\textsuperscript{86} as well as new dimensions of warfare in the cyber realm.\textsuperscript{87} The grey

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{83} Ibid 629-632 (Justice Stevens).
\item \textsuperscript{85} See, eg, Corn, above n 81, 61.
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zone of peacetime and the new paradigm of international security heralded by the ‘War on Terror’ make the Hague and Geneva Conventions, as well as the Charter of the United Nations, appear increasingly old-fashioned and out-of-touch in certain aspects of international relations.

Accordingly, this framework of laws has been subject to focused criticism of its suitability to govern modern conflict. As Bowman contends, 'mechanical application of venerable principles to modern situations can lead to anomalous conclusions'. Indeed, today states resort to methods that are not expressly considered by the Charter of the United Nations such as pre-emptive self-defence, humanitarian intervention, and drone and cyber warfare. The existing laws of war face increasing pressure as the nature of conflict and threats change, and the methods used to respond adapt.

The strain on international law has already provided opportunities for many areas of international law relating to conflict, security and war to evolve in recognition of these continuing changes. The Protocols Additional to the Geneva Conventions exemplify this evolution, building upon Common Article 3 of the

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87 See generally, Robert Bracknell, 'Trust Not their Presents, Nor Admit the Horse: Countering the Technically-Based Espionage Threat' (2006) 12(3) Roger Williams University Law Review 832.
88 Rishikof and Bratton, above n 74, 675.
Geneva Conventions to extend the frame of international armed conflict, and expand the laws of war and protections of victims in non-international armed conflicts. Developments relating to guerrilla fighters and private security contractors are further examples. Indeed, international laws concerning jus ad bellum and jus in bello are being stretched and strained in various capacities as traditional doctrines such as the right of self-defence are tested. In contrast, traditional peacetime espionage has been left undisturbed.

As illustrated, modern-day espionage is practiced in a vastly different strategic security context to that in which the Charter of the United Nations and the Hague and Geneva Conventions were drafted. The once clear-cut wartime-peacetime division that underpins the conventional legal framework around espionage is becoming increasingly tenuous.

B Situating Espionage Within this Modern Peacetime Environment

Of course, the utility of intelligence in foreign policy decision-making is axiomatic. Espionage produces intelligence, which feeds risk assessments formulated to guide security decisions. Importantly, this modern security terrain is ‘ripe for continued

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94 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978).
95 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1979), arts 43, 44.
98 Demarest, above n 4, 321; Jon Michaels, 'All the President's Spies: Private-Public Intelligence Partnerships in the War on Terror' (2008) 96(4) California Law Review 901, 901.
reliance on espionage"\textsuperscript{99} to develop information about state and non-state actors and the various threats they pose. States are ‘acutely aware that today’s pivotal battlefield is an informational one’.\textsuperscript{100} Intelligence activities are being conducted on unprecedented scales and through evolving technologies well beyond those once envisaged. In an era plagued by a multiplicity of threats, in which rogue states do not participate in arms control efforts and other measures designed to increase confidence and stability, and in which the threat of the proliferation of weapons of mass destruction and the risk of ‘loose nukes’ abound, there is a pressing need for adequate intelligence.\textsuperscript{101} This is a need served in part by espionage.

Intelligence is one of states’ first lines of defence. Indeed, spying is ‘potentially one of the most effective weapons’\textsuperscript{102} in this environment of shifting and fluid security threats.\textsuperscript{103} Human agents remain an essential part of the international spy game, as drones and computers cannot detect the motives, intentions and mindsets of non-state actors as readily as humans can. This applies equally to targeted states by helping to discern between mere rhetoric and the actual intention of political leaders.

Espionage is still frequently a state-to-state act. For example, in 2013 a Dutch court ruled that a former foreign ministry worker was a Russian spy, providing secret information relating to the North Atlantic Treaty Organisation’s practices regarding Afghanistan and Libya.\textsuperscript{104} In 2012, Canadian sub-lieutenant Jeffry Delisle was sentenced to 20 years gaol for acting as a Russian spy, passing official secrets to the

\textsuperscript{99} Baker, above n 52, 1111.
\textsuperscript{100} Michaels, above n 98, 901.
\textsuperscript{101} Scott, above n 69, 225.
\textsuperscript{102} John Schindler, ‘Defeating the Sixth Column: Intelligence and Strategy in the War on Islamist Terrorism’ (2005) 49(4) \textit{Orbis} 695, 709.
\textsuperscript{103} Baker, above n 52, 1093.
Russian military via USB flash drive. In 2011, two Thai nationals were sentenced to gaol in Cambodia for espionage. In 2010, the United States uncovered a 10-person Russian sleeper cell spy ring. In the last decade, Ana Montes and Marta Velazquez were found to have been spying in the United States Defense Intelligence Agency on behalf of Cuba.

However, traditional definitions and the international legal architecture relating to espionage arguably do not account for the evolution of espionage as a practice of states in modern world politics. The initial conventions and formulations touching upon espionage pre-dated the creation of many foreign intelligence agencies. Peacetime espionage is predominately carried out not by members of the armed forces as contemplated by the Hague Conventions, but rather by individuals in government agencies like China’s Ministry of State Security, the Australian Secret Intelligence Service or Israel’s Mossad. For example, diplomatic spies under the guidance of the South Korean National Intelligence Service were recently uncovered in 2011 in Australia’s capital to be cultivating public officials to pass secret information.

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Further, there are new targets of peacetime espionage in the form of non-state actors operating within the territory of sovereign states. States increasingly seek intelligence not necessarily about other states, their governments or military, but rather about non-state actors existing within another state’s territory. For example, in the 1990s, Moroccan spy Omar Nasiri infiltrated the al-Qaeda Khalden training camp in Afghanistan on behalf of European counter-terrorism agencies such as France’s Directorate-General for External Security.\footnote{Omar Nasiri, Inside the Jihad: My Life with Al Qaeda (Basic Books, 2008); Mark Landler, ‘Qaeda operative kisses and tells - but is it true?’, The New York Times (Online), 16 November 2006 <http://www.nytimes.com/2006/11/16/world/europe/16iht-terror.3568564.html?pagewanted=all>.} In 2012, the United States sponsored a Yemeni spy to gather information on al-Qaeda affiliates, leading to the assassination of Adnan Al-Qadhi by drone strike.\footnote{Fakhri Al-Arashi, ‘Al-Qaeda Releases Taped Spy Confession’, National Yemen (Online), 20 April 2013 <http://nationalyemen.com/2013/04/20/al-qaeda-releases-taped-spy-confession/>; ‘Alleged US spy crucified in Yemen’, The Times of Israel (Online), 30 August 2012 <http://www.timesofisrael.com/alleged-us-spy-crucified-in-yemen/>.} In 2011, 5 Pakistani clandestine informants for the Central Intelligence Agency were arrested for providing information and operational support for the surveillance and eventual raid of the bin Laden compound in Abbottabad, Pakistan.\footnote{Pakistan arrests CIA informants in Bin Laden raid (15 June 2011) BBC News <http://www.bbc.co.uk/news/world-south-asia-13773541>; Declan Walsh, ‘Pakistan arrests five men for helping CIA spy on Bin Laden house’, The Guardian (Online), 15 June 2011 <http://www.guardian.co.uk/world/2011/jun/15/pakistan-arrests-five-spying-cia>.} Additionally, Britain’s MI5 is well known to have been conducting intelligence operations towards Irish Republican Army operatives throughout Europe for many decades.\footnote{See generally, Richard Norton-Taylor, ‘MI5 spy infiltrates Real IRA’, The Guardian (Online), 9 April 2001 <http://www.guardian.co.uk/uk/2001/apr/09/northernireland.ireland>.} When territorially-intrusive espionage operations target non-state actors, including individuals within another state’s territory, various questions arise around the suitability of traditional definitions of espionage and conventional understandings of it being a purely inter-state practice.

Additionally, espionage is increasingly being conducted for relatively novel purposes, beyond national security or merely for keeping a watchful eye. For example,
in 2013, British and American agents have been employed amongst the Syrian conflict to ascertain the use of chemical weapons.\(^{114}\) These intelligence-gathering missions appeared to be for humanitarian purposes, to determine whether such weapons have been used against civilians and rebels, and to inform decision-making processes towards aiding the rebels or intervening in some way for the protection of civilians. It has also been revealed in the recent ‘Prisoner X’ controversy surrounding the death of Mossad agent Ben Zygier that the intelligence operation which was sabotaged by Zygier was directed primarily towards the repatriation of the remains of three missing Israeli soldiers in Lebanon, and not towards undermining Hezbollah.\(^{115}\)

What do these general trends mean for questions around the legality of espionage in all times other than clear-cut, state-centric wartime? Writing in 1996, Demarest argued that ‘the development of international legal principles regarding peacetime espionage has lagged behind changes in international intelligence gathering norms and practices’.\(^{116}\) This is an accurate evaluation given the profound changes in the international intelligence community and the growth in espionage.\(^{117}\) Even in 1972 it was Edmondson’s opinion that ‘antiquated rules remain rigid’ and that the venerable *Hague Conventions* ‘serve to crystallize the law of espionage in its


\(^{116}\) Demarest, above n 4, 321.

\(^{117}\) See generally Bracknell, above n 87.
outmoded form’.\textsuperscript{118} This commentary remains apposite to this day because the legal approaches to espionage continue to be tied to ‘archaic’ theoretical foundations.\textsuperscript{119} Consequently, the traditional ‘either/or’ triggering paradigm of traditional international laws of war and espionage is insufficient today.\textsuperscript{120} It is important to be pragmatic in addressing these shortcomings if international law, specifically relating to ‘peacetime’ espionage, is to remain meaningful into the future. The legitimacy and authority of international law is arguably undermined when it does not contemplate a practice so prolific and so vital to modern international security.

‘Peacetime’ espionage must therefore be brought in from the cold and finally be proactively contemplated by international law in some way. As this security context continues to evolve, the traditional rationale for the differing legality of spying in wartime and peacetime identified in Part II faces growing pressure and warrants further academic treatment. The sanctity of the principle of non-intervention, which indirectly makes espionage a violation of international law in times other than clear-cut war, must withstand a barrage of conflicting state and non-state practice. Additionally, because the traditional war and peace distinction is under strain, and the nature of peacetime is increasingly tumultuous and uncertain, the ambivalence and indirect treatment of contemporary peacetime espionage under international law is becoming inadequate.

\textsuperscript{119} Ibid 447.
\textsuperscript{120} Geoffrey Corn, ‘Making the Case for Conflict Bifurcation in Afghanistan, Transnational Armed Conflict, al Qaeda, and the Limits of the Associated Militia Concept’ (2009) 85(1) International Law Studies 181, 185-86.
IV A RIGHT OF ‘INTELLIGENT SELF-DEFENCE’

The nature of modern peacetime suggests there is an opportunity and a need to begin to recognise and contemplate espionage in times other than clear-cut war. If self-defence and its extended doctrines are accepted as legitimate exceptions to the long-standing norm of non-intervention and the prohibition on the use of force, then ‘peacetime’ espionage and its inherent territorial violation might find solace within the extended rubric of self-defence and *jus ad bellum*. Accepting the extended doctrines of self-defence are legitimate, Part IV will argue that peacetime espionage may be justified in certain contexts as an incidental or ancillary right to the right of self-defence, which could consequently help to build a more intelligent self-defence doctrine.

A The Right of Self-Defence

Under Article 51 of the *Charter of the United Nations*, each member state is accorded the inherent right of self-defence if an armed attack occurs against it. This rule is a fundamental tenet of international law and security, and is one of a few exceptions to the prohibition on the use of force in Article 2(4) and the customary principles of non-intervention and territorial inviolability. International system stability,121 survival122 and self-preservation123 are the fundamental rationales behind the right of self-defence.

121 Armstrong, Farrell and Lambert, above n 65,121.
123 The Caroline Case, Diplomatic Correspondence between Mr Webster, for the US, and Mr Fox, for the UK, 24 April, 1841, cited in Triggs, above n 40, 615. See also Yale Law School’s Avalon Project: The Avalon Project, *British-American Diplomacy: The Caroline Case* (2008) Lillian Goldman Law Library, Yale Law School <http://avalon.law.yale.edu/19th_century/br-1842d.asp>.
This doctrine has traditionally been interpreted narrowly and strictly;\textsuperscript{124} the right to act in self-defence is not triggered until an armed attack occurs, which is a high threshold. Additionally, the invocation and exercise of the right of self-defence is informed and governed by ‘necessity’ and ‘proportionality’, two cardinal principles of customary law on the use of force.\textsuperscript{125} Necessity is generally understood as meaning no alternative response is possible. Proportionality considers the degree, duration and target of the response.\textsuperscript{126} An example of where the right of self-defence was explicitly upheld by the United Nations Security Council was the 1990 Iraq/Kuwait conflict.\textsuperscript{127} Restrictionists argue that Article 51 supersedes any previous customary principles on the right of self-defence,\textsuperscript{128} limiting the right to the article’s simple formulation.

B Extending the Right of Self-Defence

The scope of Article 51 has been gradually challenged in recent decades as some states and scholars have called for a more expansive interpretation to the right of self-defence. Events such as 9/11 and the 2003 Iraq War have incited debates about the desirability of an enlarged right of self-defence, which permits pre-emptive and anticipatory defensive action.\textsuperscript{129} For example, the 2002 United States National Security Strategy provided that ‘[t]o forestall or prevent such hostile acts by our

\begin{footnotesize} 
\textsuperscript{125} Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226; Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) [2005] ICJ Reports 168.
\textsuperscript{126} Christine Gray, International Law and the Use of Force (Oxford University Press, 2008) 150.
\textsuperscript{127} SC Res 661, UN SCOR, 2933\textsuperscript{4} mtg, UN Doc S/RES/661 (6 August 1990).
\textsuperscript{129} Rishikof and Bratton, above n 74, 668.
\end{footnotesize}
adversaries, the United States will, if necessary, act pre-emptively’. Prior to the 2003 Iraq invasion former President Bush argued that to stick to a rigid interpretation would be ‘suicide’ in a world of terrorism and nuclear proliferation. From a similar standpoint, Russian President Vladimir Putin and former Prime Minister of Australia John Howard have previously defended the right strike pre-emptively. Rationalities underlying these modern security strategies rest upon the change in the calculus of self-defence from the evolving nature of modern conflict and the enhanced capacity of actors to rapidly employ devastating force, outlined in Part III.

It is important for self-defence and the rationale underpinning it to remain meaningful in the modern security environment. For this reason, Chainoglou has noted that state practice and a number of academics indeed favour ‘a more lax interpretation of the right of self-defence’. The debated scope of self-defence may be viewed on a horizontal scale; ‘alongside the threat that matures until it turns into an armed attack, the right of self-defence builds up from preventive, to pre-emptive, to anticipatory, to actual self-defence against an already occurring attack’. Preventive self-defence, entailing the use of force even where there is no reason to believe an attack is imminent, receives little scholarly support and arguably stretches self-defence too far to be legitimate. Pre-emptive measures concentrate on the

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131 Armstrong, Farrell and Lambert, above n 65, 131.
134 Ibid 79.
135 Ibid 68-69.
developing capabilities of threatening actors.\textsuperscript{137} Anticipatory measures use force against an actor that ‘actively and imminently threatens with an armed attack’.\textsuperscript{138}

International jurisprudence suggests that there is a customary right of self-defence outside of Article 51,\textsuperscript{139} although the scope of this right is uncertain. The growing state support for pre-emptive self-defence in the aftermath of the recent Iraq War supports a developing customary rule permitting such conduct.\textsuperscript{140} Other examples of state practice of pre-emptive self-defence include Israel’s pre-emptive air strike against the Egyptian air force in 1967 and the Six-Day War; Israel’s attack on the Iraqi Osirak nuclear facility in 1981;\textsuperscript{141} Israel’s firing of missiles into Syria, most recently in May 2013 targeting missiles Israel believed were destined for Hezbollah;\textsuperscript{142} and the United States’ pre-emptive attack upon a pharmaceutical plant in Sudan in 1998. Furthermore, both the United States and Japan have claimed that they would take pre-emptive action against North Korea if they feared attack,\textsuperscript{143} and North Korea has responded with similar rhetoric.\textsuperscript{144} Rationales behind pre-emption are based not just on temporal imminence, but also the degree of potential harm and the

\begin{footnotesize}
\textsuperscript{137} Chainoglou, above n 133, 68-69.
\textsuperscript{138} Ibid.
\textsuperscript{139} Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v USA) (Merits) [1986] ICJ Rep 1986 14, 94.
\textsuperscript{141} See Armstrong, Farrell and Lambert, above n 65, 127.
\textsuperscript{143} Gray, above n 126, 223.
\end{footnotesize}
capability and probability of an attack. Nonetheless, this is admittedly a far more debated model of self-defence.

Though it is still an unsettled area of international law, authority to engage in anticipatory measures is more readily implied ‘where justified by the certain existence of an imminent threat of an attack’. Bowett argues that international law has ‘always recognised an “anticipatory” right of self-defence’. The ‘inherent’ right of self-defence can be traced to the Caroline incident where the right was argued in circumstances when the necessity is ‘instant, overwhelming, and leaving no choice of means, and no moment for deliberation’. This recognises that anticipatory self-defence may have a place within international law in such circumstances. It suggests that an ‘armed attack’ can be imminent even if it does not materialise.

The ICJ has avoided pronouncements on the limits of the right of self-defence where it is not central to its conclusion. In its Advisory Opinion in Legality of the Threat or Use of Nuclear Weapons, the ICJ did not rule out the possibility of anticipatory self-defence. It was also fairly ambivalent on its legality in

147 Ward, above n 76, 137.
149 The Caroline Case, Diplomatic Correspondence between Mr Webster, for the US, and Mr Fox, for the UK, 24 April, 1841, cited in Triggs, above n 40, 615. See also Yale Law School’s Avalon Project: The Avalon Project, British-American Diplomacy: The Caroline Case (2008) Lillian Goldman Law Library, Yale Law School <http://avalon.law.yale.edu/19th_century/br-1842d.asp>.
150 Chainoglou, above n 133, 73.
151 Gray, above n 126, 129.
153 Armstrong, Farrell and Lambert, above n 65, 127; but see, Gathii, above n 132, 79.
Nicaragua, largely leaving the issue open. In his dissenting opinion, Judge Schwebel, supporting an expanded reading of self-defence, said:

I do not agree with a construction of the United Nations Charter which would read article 51 as if it were worded: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if, and only if, an armed attack occurs'. I do not agree that the terms or intent of article 51 eliminate the right of self-defence under customary international law, or confine its entire scope to the express terms of article 51.

Despite the ICJ’s reluctance to confirm or deny a right of anticipatory self-defence, the Secretary-General’s High Level Panel has identified that the right of anticipatory self-defence is part of the right of self-defence, and that the concept of ‘armed attack’ includes ‘imminent attack’. Even in 1958, Bowett believed that ‘[n]o state can be expected to await an initial attack which, in the present state of armaments, may well destroy the state’s capacity for further resistance and so jeopardize its very existence’. Indeed, strict interpretations of Article 51 requiring an armed attack become ‘simply unworkable’ in this modern security environment, and fail to reflect the nature of modern threats. Consequently, Chaingolou argues for a reconceptualization of the right of self-defence to ensure it continues to adequately

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155 Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v USA) (Merits) [1986] ICJ Rep 14.
156 Armstrong, Farrell and Lambert, above n 65, 127.
157 Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v USA) (Merits) [1986] ICJ Rep 14, 347 (Judge Schwebel) (emphasis added).
159 D W Bowett, Self-defence in International Law (Manchester University Press, 1958) 191.
160 Triggs, above n 40, 618.
address contemporary threats.\textsuperscript{161} This reflects much of the rationale for these extended doctrines of self-defence.

For these reasons, the championed ‘War on Terror’ challenges narrow interpretations of Article 51, as both non-state actors and the states that harbour them become targets of measures of self-defence that occur outside of the traditional context of a response to an armed attack by a state which has already materialised. Accordingly, the United Nations Security Council recognised in Resolutions 1368\textsuperscript{162} and 1373\textsuperscript{163} the inherent right of self-defence against non-state actors.\textsuperscript{164} Such measures are warranted where the state in whose territory the non-state actor is planning or preparing attacks is unwilling or unable to take the necessary action to prevent further acts of terror emanating from within its borders,\textsuperscript{165} an obligation identified by the ICJ back in the 1949 Corfu Channel case.\textsuperscript{166} Additionally, Judges Buergenthal and Higgins in the ICJ’s Advisory Opinion in Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory\textsuperscript{167} observed that nothing in the text of Article 51 limits the availability of self-defence only to situations where the armed attack is made by a state.\textsuperscript{168} Additionally, Triggs argues that Security Council resolutions following 9/11 also impliedly justify intervention against a state that supports or harbours non-state actors who have carried out a terrorist attack, and

\textsuperscript{161} Chainoglou, above n 133, 79-81.
\textsuperscript{162} SC Res 1368, UN SCOR, 4370th mtg, UN Doc S/RES/1368 (12 September 2001).
\textsuperscript{163} SC Res 1373, UN SCOR, 4385th mtg, UN Doc S/RES/1373 (28 September 2001).
\textsuperscript{164} See also Dinstein, above n 97, 225; Bethlehem et al, above n 35.
\textsuperscript{166} Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania) (Merits) [1949] ICJ Rep 4, 22.
\textsuperscript{167} Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 3 (Judges Buergenthal and Higgins).
\textsuperscript{168} Ibid 5 (Judge Buergenthal), 33 (Judge Higgins).
that there is a ‘right to ‘pre-emptive’ action to prevent future attacks’.169 This view attracts scholarly support.170

The right of self-defence is an evolving one that will arguably adapt in order to accommodate security threats in different contexts. The preceding analysis outlines that extended self-defence doctrines might be invoked pre-emptively or anticipatorily against both state and non-state actors. Notwithstanding the contested legality of these extended forms, a broader reading of self-defence is arguably justified given its importance in this modern security environment. Accordingly, the following analysis proceeds on the assumptions that both pre-emptive and anticipatory measures are lawful exercises of self-defence, or that that is the direction in which international law is ineluctably heading.

C A Right to Conduct Espionage Incidental or Ancillary to the Right of Self-Defence

If pre-emptive and anticipatory measures are accepted as legitimate exercises of self-defence, then, by logical extension, the necessary processes to gather the information to decide on the nature and imminence of any threat are arguably equally permissible. In this way, could some forms of peacetime espionage be considered internationally lawful, as exceptions to the norm of non-intervention, as incidental or ancillary parts of the doctrine of self-defence? Taking a realistic perspective of the utility of espionage, should it be a legitimate action within the framework of jus ad bellum in certain contexts outside of clear-cut war? If so, what legal or practical implications might flow from such an argument?

169 Triggs, above n 40, 625.
Addressing these questions requires a lateral shift in the frame of reference for espionage from *jus in bello* towards *jus ad bellum*. A total reconceptualization of the function and utility of peacetime espionage in international law and international relations properly places peacetime espionage into the realm of *jus ad bellum* under the extended rubric of the right of self-defence. But, as outlined, espionage has traditionally been contemplated by international law only within *jus in bello* as a ruse of warfare. Yet as the modern security environment actually increases the need for espionage, resulting in unprecedented scales of practice, it is important to shift conceptually from debating espionage only as a legitimate or illegitimate means of warfare to a practice relating to whether authority exists for the use of force. Only then may peacetime espionage be adequately handled by international law. Indeed, intelligence gleaned from espionage can go to the very premise of *jus ad bellum* in determining when the use of force is warranted. Only informed states may accurately make this determination.

1. **Should a Right to Conduct Espionage Incidental or Ancillary to the Right of Self-Defence Develop?**

This section contends that by situating espionage within the self-defence rubric, it can, in certain contexts, be a justified violation of the principle of non-intervention, where it is specifically directed towards the invocation of the right of pre-emptive or anticipatory self-defence. When carried out to gather intelligence on the planning, organisation and logistics that precede an armed attack, espionage is a practice ancillary to the lawful exercise of the right of self-defence.

Espionage conducted with the purpose of informing the lawful invocation and effective exercise of the extended right of self-defence should be justified as a lawful
practice incidental to that parent right. To keep the right of self-defence relevant in the modern international system, espionage (at least in some forms) should be considered necessary and appropriate to effectuate the exercise of the right of pre-emptive and anticipatory self-defence. This is because it would lead to more legitimate invocations of self-defence and more effective defensive measures. A more ‘forgiving standard for spying in self-defence’ is warranted if the crucial right to self-defence is to remain meaningful into the future.\textsuperscript{171} This would arguably be a reasonable and appropriate means of furthering the object of the right of self-defence. Although he does not fully develop the point, Scott provides in-principle (if cursory) support for this proposition, stating that espionage ‘in the territory of other nations that present clear, articulable threats based on their past behaviour, capabilities and expressions of intent, may be justified as a practise essential to the right to self-defence’.\textsuperscript{172}

To avoid doubt, this argument does not propose a blanket justification for all types of espionage and for all purposes. Unlike in wartime, only those incidents that can be brought within the purpose of informing the legitimate invocation and exercise of the right of self-defence should be justified. Spying for mere general purposes, like the South Korean diplomatic spies uncovered in 2011 in Australia to be engaging in economic espionage,\textsuperscript{173} would not likely fall within the rubric of extended self-defence and thus do not attract the same justifications. Admittedly, this may be a particularly hard line to draw in practice, but for the purposes of conceptual discussion and the cogency of argument it is an important one.

\textsuperscript{171} Forcense, above n 5, 199; Baker, above n 52, 1096.
\textsuperscript{172} Scott, above n 69, 225.
\textsuperscript{173} See Dorling, above n 109.
As they are the two elements that govern and regulate the exercise of the right of self-defence,\textsuperscript{174} necessity and proportionality should underpin any argument to incidentally accommodate espionage within the self-defence rubric.

(a) \textit{Espionage Leads to a More Informed Invocation of the Right of Self-Defence by Helping to Assess ‘Necessity’}

Espionage is an essential practice to inform the constitutive element of ‘necessity’ of the law of extended self-defence. The only way a state can properly exercise the right of pre-emptive or anticipatory self-defence is if it has a high degree of certainty surrounding the threat it is combatting. Indeed, a key problem with the exercise of the right of self-defence and its extended forms is that the legitimacy of pre-emptive or anticipatory defensive action relies heavily on the quality of the intelligence that inspires the use of force.\textsuperscript{175} Espionage can provide the necessary evidence for when the authority to employ military force may be granted under the right of self-defence,\textsuperscript{176} and to help avoid miscalculations and uncertainty. It is thus logical to extend the rubric of self-defence to contemplate peacetime espionage.

How are states to know of a threat, and whether it justifies the use of force, without actionable intelligence? How do states determine the status of the threat, the intent and capability of the actor, and the necessary reaction time to assess whether to take action in self-defence pre-emptively, anticipatorily, or otherwise? These questions must be examined ‘in the light of real and substantial evidence’;\textsuperscript{177} evidence partly collected by espionage. A thorough understanding of the rationale behind self-

\textsuperscript{174} \textit{Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226; Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) [2005] ICJ Rep 2005 168.}


\textsuperscript{176} See Triggs, above n 40, 618; Shah, above n 158, 111; Guiora, above n 175, 15.

\textsuperscript{177} Chainoglou, above n 133, 88.
defence and its extended doctrines helps to logically argue that actionable information is necessary for their legitimate invocation. Measures of anticipatory or pre-emptive self-defence are only legitimate when supported by cogent and accurate evidence of a developing or imminent attack, of the actor likely to perpetrate it, and of the likelihood of a responsive use of force succeeding in eliminating the threat.\textsuperscript{178}

In an era where intention is collapsed into capacity,\textsuperscript{179} threats can be materialised in a very short time frame and without warning. Consequently, Chaingolou proposes that any right of extended self-defence is dependent upon the timing, probability and degree of a future attack,\textsuperscript{180} factors which cannot adequately be assessed without vital intelligence gleaned from espionage. Accordingly, by helping to identify and evaluate the imminence of a threat, Scott notes that the ‘need for intelligence to support the effective exercise of the right of anticipatory self-defence is greater in today’s friction-filled, multipolar world than it has ever been before’.\textsuperscript{181} Furthermore, Zedalis argues that both the capacity and the intention of an adversary are of central importance if remote threats are to be accepted as ‘capable of prompting early defensive action’.\textsuperscript{182} Evidence collected from espionage can go directly towards supporting an accurate determination of these two elements, and thus the cornerstone element of necessity of use of force in self-defence.

\textit{(b) Espionage Would Lead to a More Efficient and ‘Proportionate’ Exercise of the Right of Self-Defence}

Justifying peacetime espionage would lead to more efficient and proportionate acts of self-defence. Accepting that states are allowed to anticipatorily or pre-emptively

\textsuperscript{178} Shah, above n 158, 111.
\textsuperscript{179} Rishikof and Bratton, above n 74, 670.
\textsuperscript{180} Chainoglou, above n 133, 75.
\textsuperscript{181} Scott, above n 69, 224.
\textsuperscript{182} Zedalis, above n 140, 218.
strike in self-defence, or even strike in retaliation, it is imperative that they have information about their adversary, state or non-state, which enables their strike to be proportionate, accurate and effective.

Today, the shrinking time frame in which self-defence measures may be carried out, and the risk of miscalculating intention and misconceiving facts, suggest that espionage should be an ancillary right to the right of self-defence and its extended forms. Espionage may provide the most accurate information to perform adequate calculations and assessments in a time-poor security context. In contrast to states, non-state actors cannot be trusted to behave rationally, resulting in uncertainty and unpredictability. There is, therefore, high value attached to accurate information gleaned through espionage to accurately and efficiently determine intention and capability, and thus the proportion of response required. Inaccurate perceptions of the status of a particular threat may lead to avoidable degrees of conflict and actions that are out of proportion, in terms of intensity and duration, to what is required. With imperfect information, states may overreact leading to unacceptable collateral damage and international opprobrium, or equally dangerously they may underreact leading to a successful state or non-state attack that has the potential to inflict catastrophic damage. Ultimately, this would help to make defensive measures more proportionate and effective. Indeed, heavily criticised uses of force, such as the 2003 Iraq invasion, could become more internationally palatable if their necessity and proportionality are more apparent, and they could receive more legitimacy if better informed by stronger intelligence garnered from espionage.

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183 Chainoglou, above n 133, 83.
Consistent with this argument, the Secretary-General’s High Level Panel proposed basic criteria to determine the legitimacy of self-defence measures, including the seriousness of the threat, the proportionality of the proposed act to the threat, and whether there is a high chance of the military action taken being successful.\footnote{Secretary-General’s High Level Panel on Threats, Challenges and Change, above n 158, 67.} These criteria cannot be adequately assessed without proper intelligence, and therefore following the opinion of the High Level Panel, neither can the right of self-defence be legitimately and proportionately exercised. When directed towards collecting the requisite intelligence for such determinations, espionage is a necessary action to give meaning and effect to the right of self-defence. Gray also argues that ‘it is difficult, if not impossible, to employ these central criteria [of necessity and proportionality] in the absence of detailed evidence about a specific threatened attack’.\footnote{Gray, above n 126, 203.} Therefore, there should be an ancillary right to conduct espionage, as it would logically support a more legitimate exercise of the right of self-defence.

2 \textit{Could an Incidental or Ancillary Right Develop?}

Whether an incidental or ancillary right could develop depends upon whether it is a workable concept in international law, and also the ease in which international law and international relations can move from tolerance to justification of peacetime espionage today.

(a) \textit{Is an ‘Incidental’ or ‘Ancillary’ Right a Workable Concept in International Law?}

The concept of an ‘incidental’ or ‘ancillary’ right appears a relatively novel one in international law. Locating such incidental powers may require identifying a ‘general
principle of law’, which is a source of international law.\textsuperscript{187} Taking guidance from the constitutional law doctrine of ‘implied incidental powers’, it is a constitutional principle that if a government has constitutional power to legislate towards one object, then if it needs also to legislate towards something incidental to that in order to effectuate the primary objective, it should be allowed to do so.\textsuperscript{188} Further insight into such a concept might be taken from human rights jurisprudence relating to the right to life. For example, the Supreme Court of India held in 1985 that the right to life in the Constitution incidentally includes the right to livelihood because this would give greater effect and meaning to the parent right, beyond just the idea that life cannot be extinguished.\textsuperscript{189}

At least conceptually, the argument may be made that some general right under international law can, in certain contexts, be extended so long as what is covered fits within the purpose or object of the parent right. An ancillary or incidental right champions the notion of extending a right beyond that which is normally understood or formally codified, but which is essential in order to give the right effective meaning, especially in an evolving environment. Only those things with a sufficient connection to the object of the parent right could justifiably be considered ancillary or incidental to it.

Talking of the use of force and self-defence, Bowett has alluded to the concept of incidental and necessary conduct towards the achievement of the primary right. He says that:

\begin{itemize}
  \item \textsuperscript{187} Statute of the International Court of Justice art 38(1)(c).
  \item \textsuperscript{188} R v Burgess; Ex parte Henry (1936) 55 CLR 608; Nationwide News Pty Ltd v Wills (1992) 177 CLR 1; United States v Lopez, 514 US 540, (2000); United States v Morrison, 529 US 598, (2000).
  \item \textsuperscript{189} Olga Tellis & Ors v Bombay Municipality Corporation (1987) LRC (Const) 351.
\end{itemize}
The circumstances in which necessity may excuse the non-observance of the duties imposed by international law restricting the use of force are those in which, as an incidental to the exercise of the right of self-defence, the rights of an innocent state are infringed.\footnote{Bowett, above n 159, 10.}

Such conduct is ‘excusable’ because the act of self-defence against a belligerent may require that the rights of an innocent state be harmed, but only to a slight degree when compared to the harm that might occasion the other state ‘if denied the right to act out of necessity’.\footnote{Ibid.} Although Bowett speaks on the use of force in self-defence, his comments might aptly be extended to the necessity surrounding the practice of espionage incidental to self-defence.

An ancillary or incidental right would emerge alongside and be grafted onto the parent right, likely taking a similar form. It may be formally codified in a treaty, but where the parent right is a customary one, such as pre-emptive or anticipatory self-defence, an ancillary right would emerge in the same manner. This is important because to be an interest protected by law, ‘it must be validated within the framework of a legal system’.\footnote{Dinstein, above n 97, 191.} This necessarily depends upon the dynamic nature of customary international law,\footnote{Michael Hoffman, ‘Rescuing the Law of War: A Way Forward in an Era of Global Terrorism’ (2005) 35(2) Parameters 18, 27.} and would emerge gradually as it takes hold and matures.\footnote{Ibid 20.} Nonetheless, an ancillary right would develop just as much of international law does. Beginning as a controversial and arguably subversive idea, eventually the roots begin to take hold and a norm develops.\footnote{See generally Preslava Stoeva, New Norms and Knowledge in Politics: Protecting people, intellectual property and the environment (Routledge, 2010).}
(b) Moving From Tolerance to Justification of Peacetime Espionage

Despite being controversial and provoking counter-argument, a conceptual proposition to move from political toleration in international relations to justification under international law is not an unrealistically imaginative proposition, and should not be too readily discarded as impracticable or an unattainable objective. States already largely tolerate espionage at a political level, evidenced by Australia’s tepid reaction to its discovery of South Korean diplomatic spies in 2011. States do so in recognition of the utility of espionage for peace, stability and the suppression of conflict and terrorism; they understand the importance of information.

This is a proposition that does not intrude into the more controversial actual use of force under Article 51. It is not treating espionage in this context as a physical exercise of self-defence or a means of warfare, as it is treated during wartime. It is instead a proposition that would help to determine whether the prohibition on the use of force might be lifted in a certain context. It would help states to discern between those situations that warrant acts of pre-emptive or anticipatory self-defence and those that do not. It would indeed have the potential to minimise the use of force if states knew of the danger or lack thereof posed by competing state and non-state actors alike. Ultimately, it would arguably lead to a more intelligent self-defence doctrine.

Of course, in a practical sense, trying to identify actors who would call for a transition from political toleration and compromise to the public realm of international law would prove difficult. This somewhat reinforces the inherent ‘academic’ nature of this discussion.

196 Bowman, above n 90, 330.
197 See Dorling, above n 109.
198 See generally, Williams, above n 3, 1177.
3 What Practical and Legal Ramifications Would Flow?

This argument adopts a pragmatic and realistic perspective towards the issue of peacetime espionage. But it is important to consider what legal and practical ramifications might arise if such a right or justification were established.

(a) Practical Ramifications

This argument carries obvious strategic logic for individual states, but it would also be beneficial for international security. As already discussed, advanced information helps to avoid serious miscalculations of opposing states’ intentions and unnecessary state conflict.\(^{199}\) It also helps to dispel potential acts of terror, which serve to destabilise not just the domestic sanctity of a targeted state but potentially also the relationship between that targeted state and any state that may have harboured those terrorists. The attacks of September 11, 2001 and the resulting invasion of Afghanistan are case in point. To the extent that it is possible to avoid destructive surprise attacks and unnecessary conflict, Scott suggests that ‘international espionage as an instrument of self-defence seems justified’.\(^{200}\)

Espionage might also help to reduce the friction of nuclear rhetoric and brinkmanship in situations such as the recent North Korean security escalation\(^ {201}\) because of the ability to inform rational foreign policy decision-making through better-informed evaluations and calculations. This can effectuate international system

\(^{199}\) See, eg, Sulmasy and Yoo, above n 51, 633.
\(^{200}\) Scott, above n 69, 226.
stability, the object of self-defence and the *jus ad bellum* architecture. An example of such ‘pre-emptive spying’, although not in the form of espionage discussed in this paper, is Japan’s 2003 launch of two spy satellites to collect information mostly on the developing threat posed by North Korea.\(^{202}\)

By promoting a more intelligent self-defence doctrine, it might assist the primary purpose of the *Charter of the United Nations* in Article 1(1) to maintain international peace and security by removing threats and suppressing acts of aggression or other threats to international peace and security. Additionally, by better informing when the use of force in self-defence is warranted, and by helping discern between actual imminent threats and those more infant or far-fetched, justifying espionage in this way might indirectly help to bring improved clarity to the blurred security environment examined in Part III.

Admittedly, espionage may be considered a double-edged sword, which has the potential to both stabilise international relations by improving rational decision-making, and to escalate tensions by increasing mistrust and suspicion between states when an espionage mission is detected.\(^{203}\) Yet a growing ‘catch-and-release’ policy — exemplified by spy exchanges in 1952\(^{204}\) and 2010\(^{205}\) — suggests that a spy’s capture will not necessarily destabilise inter-state relations, as states’ tolerance and acceptance

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\(^{202}\) Gathii, above n 132, 93.

\(^{203}\) See generally, Falk, above n 70, 61.


of spying grows. Attempts to seek more amicable solutions to reciprocal espionage may also be identified in a receiving state’s treatment of a diplomatic spy as *persona non grata* for violation of diplomatic duties and responsibilities, rather than any international law or crime. One recent example of this watered-down treatment came in 2011, when it was discovered that South Korean diplomats in Canberra were attempting to cultivate information from Australian public servants. Surprisingly, none of the spies were even declared *persona non grata*. They were all allowed to remain in Australia, with legal action sought to protect their identities and prevent disclosure of the matter in an effort to maintain good relations with South Korea.

Further indicative of reciprocal tolerance of spying are some of the Cold War arms control agreements that indicated tolerance of espionage by allowing ‘national technical means of verification’ of treaty compliance.

Importantly, espionage is already so widely practised by states that the scale of spying would not change dramatically, and spies may continue to face domestic punishments as a deterrent. Additionally, having peacetime espionage recognized by international law in some form might provide an opportunity for more adequate treatment or regulation of espionage. Thus, justification of espionage might be achieved without a considerably deleterious effect on inter-state relations.

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206 See, eg, Colby, above n 204, 89.
209 Dorling, above n 109.
210 Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, opened for signature 26 May 1972 (entered into force 3 October 1972) art 12(1); Interim Agreement Between the United States of America and the Union of Soviet Socialist Republics on Certain Measures with Respect to the Limitation of Strategic Offensive Arms, opened for signature 26 May 1972 (entered into force 3 October 1972) art V. See also Baker, above n 52, 1102; Chesterman, above n 2, 1090-1091.
(b) Legal Ramifications

Having states better informed about the nature of the threats they face under a more intelligent self-defence doctrine would help to reduce the unwarranted and illegal resort to force. However, because self-defence is an exception to the prohibition on the use of force and non-intervention, the legal effect of an ancillary right would therefore also be to justify the violation of non-intervention that is inherent within peacetime espionage. This may lead to an abuse of the norm of non-intervention and sovereignty on false pretexts about intelligence gathering for the purposes of self-defence.

Importantly, espionage for extraneous purposes would fall outside the scope of the ancillary right. Admittedly, this may be a particularly hard line to draw and may be bent and stretched by states, creating nebulous boundaries for the legality of peacetime espionage. However, this proposition raises the possibility of an ancillary right or justification amounting to a defence in the ICJ to a claim of espionage by a violated state, as well as the potential to justify acts of self-defence reported to the Security Council by providing relevant evidence of any threats or attacks faced.

Importantly, by taking peacetime espionage somewhat out of the shadows of international law it still remains ‘espionage’. The act is still contrary and subject to the domestic laws of a violated state, and remains deceitful and clandestine. This argument does not redefine that basic element of the act. Instead, what might be open to reconsideration are the traditional understandings and definitions that conceive of espionage as a purely state-to-state act, given its variable targets today. If anything, this highlights that we need to think about the practice of espionage in new ways.
Debating a right or justification of peacetime espionage would ineluctably raise questions of immunity for captured spies. What would be the legal implications for the status and treatment of captured spies if their act were justified under international law? If peacetime spying is a fundamental part of upholding the important law of self-defence, should spies, acting on the order of their state, be afforded some sort of international status, immunity or protection for the violation of domestic crimes?

However, immunity rests on mutual interests and a relative bargain being struck. For example, diplomatic immunity is reciprocally acknowledged because it is of mutual interest to all states to do so.\(^{211}\) Not all states have mutual interests in espionage because not all states engage in it at comparable degrees. Any protections would more likely operate on a bilateral or multilateral level between a handful of practising states, rather than be universally applied. In any case, this does raise new avenues of discussion for the treatment of captured spies.

As already argued, international law might also receive greater legitimacy as a system of rules claiming to regulate international relations if it is able to finally contemplate a practice so widespread and so vital to international security. Of course, inevitably questions arise concerning what we should seek or expect from international law as a body of law, how comprehensively it should contemplate every practice of states, or whether it should work in complement with other bodies of law.

V A WAY FORWARD?

Espionage presents a challenge like no other in international law. How does international law develop around espionage when no state wants to officially address it? How do we begin to talk about law or start to think about law when that is the case? This is an especially difficult task given that competing national interests and power asymmetries between states will inevitably distort and hinder the creation of security norms around espionage. Further, finding parties who would actually campaign for this development in the law regarding peacetime espionage would prove problematic.

If nothing else, this paper advocates for the start of a conversation, albeit an inherently academic one. Despite the difficulties and assumptions in this argument, it is useful to continue the conversation about espionage and to begin to think of its role and position in international law and security in new ways, especially given the paucity of modern literature.

Given states are unlikely to proscribe espionage, as it is not in their national-interest to do so, if international law is to better handle peacetime espionage then, conceptually, the only direction it could head in is one that leads to legitimizing or justifying its practice, even in a limited way, and builds from there. Indeed, promoting a discourse around the possibility that international law might contemplate peacetime espionage as argued may provide an eventual opportunity for better oversight and further attention.

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212 Stoeva, above n 195, 2.
A treaty or convention recognising this ancillary right would be most useful for building the credibility and certainty of the law, but this would be the most difficult and unrealistic means of bridging the gap in international law’s treatment of peacetime espionage. Whilst more beneficial in the long-term, a treaty would take years to negotiate and materialise.\(^{213}\) One unlikely possibility is to redraft Article 51 to include an ancillary right to conduct espionage. Arguably, before such an amendment could occur, Article 51 would need to be redrafted to explicitly sanction pre-emptive and anticipatory self-defence. Indeed, it is ambitious to suggest a treaty or convention would be successfully created regulating what may or may not be spied upon or the circumstances that justify peacetime spying. States are unlikely to ever authoritatively permit or proscribe the practice of espionage because of the non-reflexive manner in which they approach it;\(^ {214}\) all states have an interest in spying, but equally they have an interest in preventing being spied upon. As Forcese has highlighted, it is ‘doubtful that espionage in another nation’s territory will ever be explicitly acknowledged as ‘legal’ under the law of nations’.\(^ {215}\)

Notwithstanding the inherent difficulties in trying to construct a treaty, more needs to be done to understand and flesh out a state’s right to pre-emptively and anticipatorily defend itself, and a continuing discussion on peacetime espionage would certainly help to build that understanding. Indeed, a more threadbare treaty framework might better allow cardinal norms of international law to adapt to changing circumstances, in the way that the right of

\(^{213}\) Bethlehem et al, above n 35, 4.

\(^{214}\) Chesterman, above n 2, 1072.

\(^{215}\) Forcese, above n 5, 204.
self-defence has evolved over time, and so perhaps the absence of treaty regulation of espionage is preferable.

B Recommendatory Guidelines

There is utility in drafting aspirational guidelines or codes of conduct, espousing the ‘rules of the game’. Such guidelines might define the outer limits of justifiable espionage, providing guidance as to the parameters of legal behaviour in identifying and measuring threats. They might provide that, for the benefit of international stability and inter-state relations, espionage for purposes not incidental or sufficiently connected to the exercise of the right of self-defence should not be carried out. It may prove quite difficult to set exemplary guidelines of those purposes or targets of espionage that would fall incidental and those which do not, and would ultimately rely on discretion of the state. But the difficulty in framing acceptable conduct in the law should never dissuade attempts to do so. It may be desirable to commission a panel of experts to draft such guidelines, to eliminate the appearance of national interests infiltrating the drafting process. This would be a more achievable approach, though it may be considered less authoritative if states were not involved in their production.

‘Necessity’ and ‘proportionality’ are possible elements for any aspirational or recommendatory guidelines. Guidelines might consider whether the act of espionage is necessary to effectuate the lawful invocation of the right of self-defence. To this end, they might provide recommendatory proscriptions against the conduct of espionage directed towards things other than the operation of self-defence. They might also promote proportionality in scale and the means used to conduct espionage. For example, they might stipulate that spies must avoid certain means of collecting
information including the employment of torture, murder and other crimes that begin to test the proportionality of espionage as a legitimate measure incidental to self-defence. Intelligence acquisition might begin to incur international opprobrium where it unacceptably harms innocent bystanders.\textsuperscript{216} Guidelines might also promote self-restraint from states in the interests of building inter-state confidence.\textsuperscript{217} They could help to develop, in due time, a customary law right by influencing state practice,\emph{opinio juris} and international legal opinion and doctrine around espionage and self-defence.

Lessons may be drawn from other grey zone developments in the last decade, such as those relating to private military contractors. The 2008 \textit{Montreux Document on Private Military and Security Contractors}\textsuperscript{218} recommends good state practice relating to the verification and oversight of private military and security companies. It is aimed at promoting respect for international humanitarian law and human rights law and is not legally binding. With 44 states currently supporting the \textit{Montreux Document}, it highlights that such a recommendatory framework is indeed possible in international law.

There might alternatively develop a set of flexible frameworks or steps of conflict resolution suggesting how states could go about negotiating through the potentially disruptive event of a spy’s capture. If there were an understanding of whether, or under what circumstances, espionage is legal or justified then violated states may be guided as how to respond when they uncover an intelligence operation.

\textsuperscript{216} Bowman, above n 90, 329.
\textsuperscript{217} Fleck, above n 17, 693.
For example, whether they are able to prosecute or just expel the spy, and whether they might take the offending state to the ICJ for reparations and apologies. Such frameworks might help to discourage violated states from responding aggressively through the use of force or declarations of war.

C Customary Law

A consequence of more concerted academic discussion may also be to influence customary law because it can potentially trigger the emergence of state practice and opinio juris. Indeed, such dialogue may help to produce norms around peacetime espionage that would exist as ‘guiding posts for state behaviour’ that become ‘embedded in the belief systems of policy-makers, thus influencing state behaviour’.219 Such norms might have the potential to develop into legal principles.220 Accordingly, customary law may potentially develop in this direction.

Accepting anticipatory and pre-emptive self-defence as lawful under customary international law, a pragmatic prescription may be to encourage customary international law to gradually build a justification for peacetime espionage as a mutation alongside these parent rights. Customary law is perfectly suited to address security contexts that do not fit within the Hague and Geneva frameworks,221 filling the gap where treaties fail.222 However, the development of a customary law right would inevitably face difficulties given that state practice and opinio juris currently run in opposite directions. Indeed, Forcense notes that there is ‘little doctrinal support for a “customary” defence of peacetime espionage in international law’.223 Nonetheless, despite the shortcomings in such an argument and the fact it may not be

219 Stoeva, above n 195, 13.
220 Ibid.
221 Hoffman, above n 193, 27.
222 Ibid.
223 Forcense, above n 5, 203.
tenable at this point in time, this could be a direction in which international law be encouraged to develop.

VI CONCLUSION

International law currently only contemplates espionage within *jus in bello* in times of war. This paper has demonstrated the need and opportunity for its recognition in times of peace, positioning it within the framework of *jus ad bellum* and under the extended rubric of self-defence. Under this framework, international law is able to begin to account for peacetime espionage where it has not done so before, building greater legal certainty around its practice. It may still be deemed a violation of non-intervention. However, an ancillary right to the right of self-defence justifies this violation when espionage is carried out with the object of informing the necessary and proportionate exercise of the right of self-defence. This is a workable prescription that promotes the rule of law and maintains the legitimacy of international law as a regulator of international relations, something that it arguably lacks when it ignores such a widespread tool of statecraft. With this more comprehensive recognition of the entire practice of espionage, there is the possibility for the development of some form of regulatory or recommendatory framework to govern peacetime espionage. It also opens up the possibility to develop academic discussion, law and practice around state responsibility and the treatment of captured spies.

There is utility in this academic process as it may lead to a more intelligent self-defence doctrine, helping to clarify issues relating to lawful pre-emptive and anticipatory self-defence measures. The right of self-defence is such a crucial power in international law, security and order. It should be fleshed out as much as possible so it may be better understood and be practised in more legitimate and lawful ways.
The ability to develop a more intelligent doctrine of self-defence arguably supports building international law’s contemplation of peacetime espionage in the way outlined.

In a more general way, this discussion highlights a need to continue to think about the place espionage inhabits in international law and international relations in new ways. There are a multitude of questions that cannot be answered here which would ineluctably follow a proposition justifying acts of peacetime espionage, most importantly those relating to the status and treatment of captured spies. There are also diverse modes of intelligence collection like cyber espionage that fall outside of the narrow conception adopted in this paper, but which inevitably colour a broader discussion. Other questions not dealt with here include whether states carrying out intelligence-gathering missions for humanitarian purposes should incur international liability for doing so, or how their agents should be treated. Further exploration into the practice of espionage incidental to humanitarian intervention would be a useful academic endeavour. This general discussion also raises broad questions around what we should seek from international law as a regulator of international relations, and whether it should step in and contemplate realities which at the international level have so far only been dealt with politically. But what is apparent is that the evolution in the security environment, and the place of intelligence gathering within it, highlights a need to develop new perspectives and ultimately a greater synthesis between espionage, international law, international relations and the modern security environment.
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