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Individual and State Responsibility for Intelligence Gathering

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INDIVIDUAL AND STATE RESPONSIBILITY FOR INTELLIGENCE GATHERING

Dieter Fleck*

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States routinely engage in intelligence activities, as generally understood to mean gathering information for national security, military, or police purposes, often in a covert manner and with questionable effectiveness of legislative attention and control.¹ Yet even acts that receive

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1. See Lori Fisler Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs*, 83 AM. J. INT'L L. 1 (1989) (discussing the United States' view); Lori Fisler Damrosch, *Covert Operations*, 83 AM. J. INT'L L. 795, 805 (1989).

Congress has opted to be the silent partner. It has deliberately decided to be involved remotely, partially, through a select few of its members who may offer advice but have few means to change a presidential decision. Congress might have chosen differently; it might some day in the future be pressed to greater involvement.

Id.

By contrast, the following information used to be in the CIA Factbook on Intelligence:

Following allegations of wrongdoing by U.S. intelligence agencies, the Senate established the Senate Select Committee on Intelligence (SSCI) on 19 May 1976. The House of Representatives followed suit on 14 July 1977 by creating the House Permanent Select Committee on Intelligence (HPSCI). These committees, along

legislative approval may be unlawful. In international relations certain rules and restrictions cannot be set aside. Even if governments tend to portray situations as emergencies and emphasize the need to take extra-legal measures in “ticking time-bomb” scenarios, serious breaches of law must have legal consequences in the interest of public welfare and the protection of individual victims. It is the purpose of this contribution to examine relevant norms and principles for assessing acts of intelligence gathering under international law (Part I), evaluate legal problems of attribution of such acts (Part II), and, where governments commit wrongful acts, look into circumstances precluding their wrongfulness (Part III). Based on these considerations, legal consequences for criminal accountability (Part IV) and reparation (Part V) will be discussed. Finally, some conclusions may be drawn (Part VI).

I. WHEN IS INTELLIGENCE GATHERING ILLEGAL?

No general norm exists in international law expressly prohibiting or limiting acts of intelligence gathering. On the contrary, even in the case of espionage—a “consciously deceitful collection of information, ordered by a government . . . accomplished by humans unauthorized by the

with the Armed Services as well as the Foreign Relations and Foreign Affairs Committees, were charged with authorizing the programs of the intelligence agencies and overseeing their activities. The 1980 Intelligence Oversight Act established the current oversight structure by making SSCI and HPSCI the only two oversight committees for the CIA. The Appropriations committees, given their constitutional role to appropriate funds for all U.S. Government activities, also exercise some oversight functions. In addition, the CIA interacts closely with other committees, depending on issues and jurisdiction. The Office of Congressional Affairs in CIA deals directly with oversight issues. SSCI and HPSCI receive over 2,200 CIA finished intelligence products annually. Moreover, CIA officials and analysts provide more than 1,200 substantive briefings a year to members of Congress, congressional committees, and their staffs. In addition, the Office of Congressional Affairs provides annually an average of 150 notifications to our oversight committees; responds to approximately 275 Committee Directed Actions, including preparation of Annual Reports; and prepares responses to nearly 500 oral and written inquiries. With input from other agencies in the Intelligence Community (IC), the Office of Congressional Affairs prepares the annual draft of the Intelligence Authorization Act; monitors all new legislation introduced to determine the potential impact on the Intelligence Community and its activities; and seeks legislative provisions needed by the CIA and the IC (with concurrence of the Administration). A review of the Congressional Record and other sources for Congressional legislative activities of interest to CIA is conducted daily.

OFFICE OF PUB. AFFAIRS, CENT. INTELLIGENCE AGENCY, *FACTBOOK ON INTELLIGENCE* (2003). The *Factbook on Intelligence* is currently being revised and is unavailable from the CIA. However, an archived version of the text is available at <http://robertdell.dyndns.org/facttell/textonly.shtml#12>.

target to do the collection”²—spies receive a certain minimum protection under the law of armed conflict. The 1907 Hague Regulations Respecting the Laws and Customs of War on Land confirm that the employment of measures necessary for obtaining information about the enemy are generally permissible.³ Belligerent espionage is not a violation of the laws of war. For purposes of national punishment, a person can only be considered a spy “when, acting clandestinely or on false pretences, he obtains or endeavors to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.”⁴ The Regulations expressly require trials before punishment,⁵ and they even exclude criminal prosecution for previous acts of espionage of spies who, after rejoining the army to which they belong, are subsequently captured by the enemy.⁶ The 1977 Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) reaffirms these principles and extends them to residents of occupied territory.⁷

Yet acts of intelligence gathering committed by civilians in an armed conflict during a concrete and coordinated military operation would not be protected by the laws of war and would be objects of legitimate attack, if these civilians’ actions amounted to direct participation in hostilities. This applies, for instance, to transmission of tactical intelligence to attacking forces or instruction and assistance given to troops with regard to the execution of a concrete military operation. Conversely, activities that may support the conduct of hostilities but fall short of participation in a concrete and coordinated military operation would not deprive these civilians of legal protection against attack.

The late Richard Baxter provides the classical answer to the question of whether espionage is legally, or at least morally or politically, prohibited. He states there is “virtual unanimity of opinion that while the morality of espionage may vary from case to case, some, and probably all, spies [in an armed conflict] do not violate international law. A

2. Christopher D. Baker, *Tolerance of International Espionage: A Functional Approach*, 19 AM. U. INT’L L. REV. 1091, 1093 (2004) (quoting Lt. Col. Geoffrey B. Demarest, *Espionage in International Law*, 24 DENV. J. INT’L L. & POL’Y 321, 325–26 (1996)).

3. Convention (IV) Respecting the Laws and Customs of War on Land, Annex: Regulations Concerning the Laws and Customs of War on Land art. 24, Oct. 18, 1907, 36 Stat. 2277.

4. *Id.* art. 29.

5. *Id.* art. 30.

6. *Id.* art. 31.

7. Protocol Additional to the Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 46, June 8, 1977, 1125 U.N.T.S. 3; see INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 563 (Yves Sandoz, Christophe Swinarski & Bruno Zimmerman eds., 1987).

distinction may, of course, be made with respect to espionage other than in time of war, for such conduct is of doubtful compatibility with the requirements of law governing the peaceful intercourse of states."⁸ The fact that no explicit treaty norms address peacetime espionage is paradoxical in light of the enormous amount of intelligence activities and their relevance for international relations between states. The question of the legality of peacetime espionage has no easy answer. In the recent past, many arguments for the legality of certain acts of intelligence gathering arose in the context of East-West confrontation during the Cold War, for instance outside an armed conflict when peaceful cooperation was largely unrealistic.⁹ Today, such arguments are not altogether unattractive.¹⁰ Yet in the present world of complex interdependencies, another approach should be taken. Strict adherence to the dichotomy between war and peace would be ineffective and counterproductive for establishing peace and security. Also, the revolution in the transparent flow of information during recent decades has diminished the relevance of covert action and clandestine methods to the security intelligence function. Secret sources today are in constant competition with publicly available information, and they are often less reliable.

The need to improve the effectiveness of intelligence gathering given existing terrorist threats has led to increased international cooperation under increasingly transparent procedures.¹¹ At the same time, the need

8. Richard R. Baxter, *So-Called "Unprivileged Belligerency": Spies, Guerrillas and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323, 329 (1951). The U.S. Supreme Court, in *Ex parte Quirin*, 317 U.S. 1, 31 (1942), stated that spies were "offenders against the law of war subject to trial and punishment by military tribunals" for the "acts which render their belligerency unlawful." Baxter criticized this analysis in the following terms:

There is reason to suppose . . . that [the Supreme Court] was led by the somewhat imprecise distinction often made between "lawful" and "unlawful" combatants to conclude that failure to qualify as a lawful combatant could be described as a violation of international law. If, indeed, the Court was proceeding on the assumption that the law of nations forbids the employment of spies and espionage itself, that view, it is submitted, fails to find support in contemporary doctrine regarding such activities in wartime.

Baxter, *supra* at 331.

9. See Jonathan E. Colby, *The Developing International Law on Gathering and Sharing Security Intelligence*, 1 YALE STUD. WORLD PUB. ORD. 49 (1974).

10. See Loch K. Johnson, *On Drawing a Bright Line for Covert Operations*, 86 AM. J. INT'L L. 284 (1992); Geoffrey B. Demarest, *Espionage in International Law*, AM. INTELLIGENCE J., Autumn/Winter 1992-93, at 75; Demarest, *supra* note 2, at 345.

11. See, e.g., S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001). See also U.N. Sec. Council, Counter-Terrorism Comm., Country Reports, <http://www.un.org/sc/ctc/countryreports.shtml> (collecting national reports submitted to the UN Security Council Counter-Terrorism Committee that concern the implementation of Security Council Resolution 1373).

to augment professional support for better intelligence evaluation is evident. Where states have restructured national intelligence services in the course of such activities, the transparency requirements of national courts raise difficult questions.¹²

Seen in this context, covert operations might pose more problems than solutions. Furthermore, intelligence operations have revealed new areas in which the law appears inadequate. Activities that fall within the category of “information warfare”—such as spreading false information or even sabotaging computer networks—are one example. Some even claim such activities change the rules governing military operations in armed conflict¹³ and also affect international relations in peacetime.

The International Court of Justice (ICJ) has not taken a position on the issue of peacetime espionage, although it has had the opportunity to do so on a few occasions. In the *Teheran Hostages* case the Iranian Foreign Minister referred to alleged espionage and interference in Iran by the United States in its embassy in Teheran. The Court did not accept this as a justification for Iran’s conduct, and thus it failed as a defense to the United States’ claims “because diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions.”¹⁴ As the Court explained, “means” under diplomatic law could include “that a diplomatic agent caught in the act of committing an assault or other offence” may, “on occasion, be briefly arrested by the police of the receiving State in order to prevent the commission of the particular crime.”¹⁵ Problematic for Iran was that it “did not . . . employ the remedies placed at its disposal by diplomatic law.”¹⁶ In the *Nicaragua* case,¹⁷ close logistics, intelligence, and material support by the United States to the *contras* was central to the Nicaraguan claims. The Court drew attention to the Friendly Relations Declaration, which mandates that “no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or

12. See, e.g., PHILLIP B. HEYMANN, *TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR* 171–78 (2003).

13. See, e.g., Mark Russell Shulman, *Legal Constraints on Information Warfare* (Ctr. for Strategy and Tech., Air Univ., Occasional Paper No. 7, Mar. 1999); *Symposium on Computer Network Attack and International Law*, 76 INT’L L. STUD. (Michael N. Schmitt & Brian T. O’Donnell eds., 2002).

14. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 38 (May 24).

15. *Id.* at 40.

16. *Id.*

17. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

interfere in civil strife of another State.”¹⁸ It even emphasized the importance of this declaration and the fact that the United States actively supported its development and adoption.¹⁹ The judgment of the Court, however, concentrated on the threat or use of force as well as on violations of international humanitarian law, and it did not endorse Nicaragua’s view of subversive activities by the United States as indirect means of coercion and intimidation.²⁰

Legal scholars often take a fatalist position on the phenomenon of intelligence gathering. They mostly conclude that covert action must be taken for granted. Some even try to deny state responsibility in this context, relying on the fact that spies are not official agents of states for the purpose of international relations, and indeed, if they are caught abroad, the capturing state can severely punish and expel them.²¹ This denial of state responsibility may meet realistic expectations in an imperfect world, as a spy is concealing his or her activity as an agent of a state. Yet peacetime rules of international law may be seen as including an implicit prohibition on subversive activities, as reflected in the Friendly Relations Declaration. Such an understanding may be based on the principle of nonintervention in the political independence of any other state and its internal affairs, which includes a prohibition on “indirect or subversive intervention involving secret activity,” if “a jungle world which places a premium on skills in subversion, infiltration, espionage, guerrilla warfare, nibbling aggression, and other forms of intervention” is to be avoided.²² The illegality of covert action may also have other bases, such as unauthorized entry into a foreign state’s airspace or territory,²³ illegal exercise of jurisdiction on foreign territory, attempts to destabilize the

18. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), at 123, U.N. Doc. A/Res/2625 (Oct. 24, 1970).

19. For the negotiating history of this language, see *Report of the Special Comm. on Principles of Int’l Law Concerning Friendly Relations and Co-operation Among States*, at 161, U.N. Doc. A/6799 (Sept. 26, 1967).

20. *Military and Paramilitary Activities*, 1986 I.C.J. at 123, 136–40.

21. Compare 1 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* § 455 (H. Lauterpacht ed., 8th ed. 1955 (stating “all States constantly or occasionally send spies abroad” and “it is not considered wrong morally, politically, or legally to do so”)), with 1 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* § 569 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992) (omitting the statement made in the previous edition).

22. Quincy Wright, *Espionage and the Doctrine on Non-Intervention in internal Affairs*, in *ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW* 3, 13, 25 (Roland J. Stanger ed., 1962).

23. Quincy Wright, *Legal Aspects of the U-2 Incident*, 54 AM. J. INT’L L. 836, 849 (1960); WOLF-WERNER LANGKAU, *VÖLKER- UND LANDESRECHTLICHE PROBLEME DER KRIEGS- UND FRIEDENSSPIONAGE: UNTER BESONDERER BERÜCKSICHTIGUNG DER AUSSPÄHUNG AUS DEM LUFT-, SEE- UND WELTRAUM* 231–41 (1970).

government of another state,²⁴ and common crimes, such as bribery, blackmail, unlawful entry into residences, or a breach of data protection laws committed in the course of such acts.²⁵ Such activities can never be justified under customary law because they are gross violations of commonly accepted legal principles. The fact that they are committed through clandestine action offers a strong argument against the existence of any alleged *opinio juris* covering such conduct in international relations between states. Hence it is unacceptable to conclude, as many have, that legal arguments can neither condemn nor justify covert action in peacetime. The opposite is true, and among the various legal disciplines involved in any thorough assessment, international law has an important role to play. Legal arguments may not only support prohibitions or limitations of certain activities of intelligence gathering, they may also advocate for self-restraint in the interest of confidence-building and stable peace.

As many covert acts have a human rights dimension, they may be illegal under the 1966 International Covenant on Civil and Political Rights or regional human rights conventions. Intelligence agencies do not take this aspect seriously enough. They often consider it sufficient to balance human rights violations against the positive intelligence their agents supply or will likely supply. Yet human rights instruments are of particular political and forensic significance. Extraordinary rendition for human intelligence gathering is a case in point, as the forced transfer of people for the purpose of conducting interrogation has often proven counterproductive and it frequently raises the concerns of human rights bodies, civil society, states, and international organizations.²⁶ It must also be considered that intelligence objectives do not justify the derogation of human rights. While it may be doubtful whether states involved in espionage activities themselves could convincingly support a legal prohibition on espionage by other states under the equitable principle of “clean hands,”

24. See Richard A. Falk, *American Intervention in Cuba and the Rule of Law*, 22 OHIO ST. L.J. 546 (1961); Richard A. Falk, *President Ford, CIA Covert Operations, and the Status of International Law*, 69 AM. J. INT'L L. 354 (1975); Richard A. Falk, *CIA Covert Action and International Law*, Soc'y, May–June 1975, at 39.

25. Johnson, *supra* note 10, at 302–308; Karl Doehring, *Spionage im Friedensvölkerrecht*, in VERFASSUNGSSCHUTZ IN DER DEMOKRATIE: BEITRÄGE AUS WISSENSCHAFT UND PRAXIS 307, 317–21 (Bundesamt für Verfassungsschutz ed., 1990).

26. See, e.g., Letter from Dick Marty, Chairperson of the Comm. on Legal Affairs and Human Rights, Parliamentary Assembly, Council of Europe, to Antonio la Pergola, President of the European Comm'n for Democracy Through Law (Dec. 15, 2005), included in Appendix III, AS/Jur/2006(03)rev (Jan. 22, 2006), available at http://assembly.coe.int/CommitteeDocs/2006/20060124_Jdoc032006_E.pdf (requesting a Legal Opinion on the legality of secret detentions and rendition flights in the light of the member states' international legal obligations). Rendition practices are dubious even for insiders. See John Radsan, *A More Regular Process for Irregular Rendition*, 37 SETON HALL L. REV. 1 (2006).

the situation is different in the case of human rights violations. Here, the owner of the right is not the state but the individual victim, and the state has an obligation to protect its citizens.

Special treaty regimes may contain specific restrictions for intelligence gathering. In this context, disputed commitments on the use of outer space for exclusively peaceful purposes,²⁷ different interpretations of the exact meaning of innocent passage through the territorial sea of a foreign coastal state,²⁸ and certain voluntary restrictions as part of regional confidence- and security-building measures²⁹ could provide elements for further legal development.³⁰ Where such specific restrictions apply, they may be of continued relevance in the event of an armed conflict. In this respect, the current work of the International Law Commission can be expected to offer new insight and widely acceptable results,³¹ so that Articles 24 and 29 through 31 of the Hague Regulations and Article 46 of Additional Protocol II may not be the last word for regulating relevant activities in armed conflicts. This is of practical significance for the application of human rights obligations of a state conducting military operations in situations where it exercises jurisdiction. It is particularly relevant for peace operations that include elements of peace enforcement and must apply international humanitarian law.

II. ATTRIBUTION PROBLEMS

The completion and final adoption in 2001 of the International Law Commission's Draft Articles on the Responsibility of States³² has facili-

27. See DETLEV WOLTER, COMMON SECURITY IN OUTER SPACE AND INTERNATIONAL LAW 14–17, 25–54 (2006).

28. United Nations Convention on the Law of the Sea (UNCLOS) art. 19(2)(c), Dec. 10, 1982, 1833 U.N.T.S. 397; David H.N. Johnson, *Innocent Passage, Transit Passage*, in 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 994, 995–996 (Rudolf Bernhardt ed., 1995).

29. See Org. for Sec. & Cooperation in Eur. (OSCE), *Vienna Document 1992 of the Negotiations on Confidence- and Security-Building Measures Convened in Accordance with the Relevant Provisions of the Concluding Document of the Vienna Meeting on the Conference on Security and Co-operation in Europe* (Mar. 4, 1992), available at http://www.osce.org/documents/fsc/1992/03/4263_en.pdf; VICTOR-YVES GHEBALI & ALEXANDER LAMBERT, THE OSCE CODE OF CONDUCT ON POLITICO-MILITARY ASPECTS OF SECURITY: ANATOMY AND IMPLEMENTATION (2005).

30. See Robert E. Hollweg, *Military Reconnaissance*, in 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 400, 403 (Rudolf Bernhardt ed., 1997).

31. See Int'l Law Comm'n, *Memorandum by the Secretariat: The Effect of Armed Conflict on Treaties: an Examination of Practice and Doctrine*, ¶ 160, U.N. Doc. A/CN.4/550 (Feb. 1, 2005).

32. Int'l Law Comm'n, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the Int'l Law Comm'n*, 53d Sess., Supp. No. 10, ¶ 76, U.N. Doc. A/56/10 (2001) [hereinafter *Draft Articles*]; see also JAMES CRAWFORD, THE INTERNATIONAL

tated the legal evaluation of actions of states. Although the Draft Articles are not part of a law-making treaty, they have exerted considerable influence, and today jurisprudence and legal literature rightly use them as an important reference document.

To establish state responsibility for certain acts of intelligence gathering as internationally wrongful acts of a state, implicating the international responsibility of that state, it is not enough to qualify such actions as constituting a breach of an international legal obligation. The action must also be attributable to the state under international law.³³ Given the nature of covert action, this test may often fail. For instance, the actor may not be identifiable as a state actor, as defined in Article 4 of the Draft Articles. The normal situation will involve rather informal acts committed by de facto agents acting in the interest of the state.

As explained in the Commentary to the Draft Articles, the conduct of private persons or entities is generally not attributable to a state under international law.³⁴ However, a specific factual relationship between a person engaging in the conduct and the state exists "if the person . . . is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."³⁵ This requires a specific assessment of the degree of control exercised by the state and its relationship with the acting person in each particular case.

A. Effective Control

The ICJ showed in the *Nicaragua* case that the "direction or control" test may be difficult to meet, as even general control by a state over a force would not necessarily mean the state has directed or enforced the acts in question. Without further evidence of specific instructions and interference by the state, individuals not under the control of the state could well be committing the acts. For this conduct to give rise to the legal responsibility of the state, "it would in principle have to be proved that the State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."³⁶

The *Tadić* decision³⁷ by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) sounded a different note on the issue of state control. After extensive discussion of the ICJ's

LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT, AND COMMENTARIES (2002).

33. *Draft Articles*, *supra* note 32, art. 2(a).

34. CRAWFORD, *supra* note 32, at 110.

35. *Draft Articles*, *supra* note 32, art. 8.

36. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 65 (June 27).

37. Prosecutor v. Tadić, Case No. IT-94-1-A, Appeal on the Merits, ¶¶ 99–145 (July 15, 1999).

decision in *Nicaragua*, the Court accepted evidence of “overall control” instead of “effective control” of insurgents in Bosnia and Herzegovina (the Bosnian Serb Army) by the Federal Republic of Yugoslavia as a sufficient basis for qualifying the ongoing armed conflict as international. Although the point of departure was the same as in *Nicaragua*, which was to ascertain the conditions where international law considers an individual to be a de facto organ of another state, it is crucial to note that the two judgments have served different purposes. The ICJ had to determine the international responsibility of the intervening state, whereas the ICTY had to establish the necessary precondition for the “grave breaches” regime of the Geneva Conventions to apply. Nevertheless, it remains of general interest that the ICTY confirmed in *Tadić* that in order to attribute the acts of a military or paramilitary group to another state, there must be proof that the state wields overall control over it, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity.³⁸ The court held it was no longer necessary that the state also has issued instructions for the commission of specific acts contrary to international law.³⁹ The Commentary to the Draft Articles, after a short discussion of the two judgments, refrains from drawing general conclusions on the exact meaning of control, but indicates in a somehow sibylline manner “[t]hat in any event it is a matter of appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it.”⁴⁰

While the term “control” and its exact requirements should not be difficult to assess in the case of military and paramilitary operations, as these are based on military leadership and command, the situation is more complex in the case of intelligence activities, which require secret planning and execution. In these cases, individual initiatives at the lowest level play a much greater role, and “effective control” of the operation within the terms of the *Nicaragua* judgment might be factually impossible to prove. Is the sending state then exempted from any possible attribution of acts of intelligence gathering, or should a lower degree of “overall control” suffice to invoke that state’s responsibility? The Commentary to the Draft Articles is silent on this issue, and relevant state practice will hardly be put to test. Whether to expect jurisprudence in this area is open to some doubt. It may depend on a change of govern-

38. *Id.*

39. *Id.*

40. CRAWFORD, *supra* note 32, at 112. For further discussion, see Dieter Fleck, *International Humanitarian Law After September 11: Challenges and the Need to Respond*, 6 Y.B. INT’L. HUMANITARIAN L. 41, 44–45 (2006).

ment in some cases. Even if the act of state doctrine⁴¹ is not applicable without restrictions,⁴² individuals affected by acts of intelligence will often hesitate to take the risk of suing a state, and the latter normally will prefer to settle the case outside public procedures.

In rare cases conduct of individuals is attributable to a state "if and to the extent that the State acknowledges and adopts the conduct in question as its own."⁴³ As explained in the Commentary, this language excludes cases of "mere support or endorsement,"⁴⁴ and thus it remains an open question whether international law considers financing or factually exploiting such acts as acknowledgement or formal adoption. States normally prefer to profit from intelligence operations without disclosing any form of participation. Attributability, however, can hardly be disputed where an act is planned and executed on the basis of distinct policy directives, such as domestic law enforcement powers to better pursue a terrorist target, and the execution of the act is funded from the state's budget.

B. *De Facto Agents*

In practice it may be even more difficult to decide whether certain instructions or the direction or control under which a person or group of persons were carrying out their conduct were "in fact" those of a state within the meaning of Article 8 of the Draft Articles. In this respect, the Commentary refers to "a specific factual relationship between the person or entity engaging in the conduct and the State" in terms of "the existence of a real link between the person or group performing the act and the State machinery,"⁴⁵ but it does not offer further elements for deliberation.

While problems arising in this respect mostly depend on the factual difficulty of establishing such links in a given situation, it is worth considering the more general issue of parallel interests of such agents and a state. This issue might lead to a congruent impetus for the performance of the act in question. In the *Tadić* case, acts imputed to the Federal Republic of

41. See *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) ("[T]he courts in one country will not sit in judgment on the acts of the government of another, done within its own territory:").

42. See, e.g., J.-P. Fonteyne, *Acts of State*, in 1 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 17 (Rudolf Bernhardt ed., 1992); ALFRED VERDROSS & BRUNO SIMMA, *UNIVERSELLES VÖLKERRECHT*, 775–76 (3d ed. 1984); Louis Henkin, *Act of State Today: Recollections in Tranquility*, 6 *COLUM. J. TRANSNAT'L L.* 175 (1967); Michael Singer, *The Act of State Doctrine of the United Kingdom: An Analysis with Comparisons to United States Practice*, 75 *AM. J. INT'L L.* 283 (1981).

43. *Draft Articles*, *supra* note 32, art. 11.

44. CRAWFORD, *supra* note 32, at 122.

45. *Id.* at 110.

Yugoslavia were likewise serving the interests of the people fighting for Republika Srpska. The militant students in the *Teheran Hostages* case expressly claimed to act on their own behalf rather than on behalf of the Iranian authorities. As a general principle, state responsibility for de facto agents should not be denied where there is convincing proof of instructions given or direction or control exercised on behalf of a state which has led to or facilitated the act performed.⁴⁶

III. CIRCUMSTANCES PRECLUDING WRONGFULNESS OF SPECIFIC ACTS

Various circumstances may preclude the wrongfulness of acts of intelligence gathering in current legal doctrine. For instance, states might claim that another state or individual claimant validly consented to an act; they may argue that the act constitutes a lawful measure of self-defense; they might claim to have taken a lawful countermeasure; or they might invoke necessity. The principle that acts not in conformity with peremptory norms (*jus cogens*) are wrongful in any event⁴⁷ does not make such circumstances irrelevant, as intelligence gathering is not *per se* a violation of international humanitarian law or other norms of *jus cogens*.

A. Consent

Valid consent by a state precludes the wrongfulness of the act in question.⁴⁸ An authorized organ of the target state must give consent before the act. But consent given retrospectively, after the conduct has occurred, may also lead to a loss of that state's right to invoke responsibility, if the injured state has validly waived or acquiesced in the lapse of the claim.⁴⁹ This may be relevant in considering relationships between governments in which national interests and support from one side combine with intelligence-gathering activities of the other side's institutions, binding them together.

The Draft Articles make no mention of consent by individual claimants, but the Commentary confirms that international law may also have

46. See Gregory Townsend, *State Responsibility for Acts of De Facto Agents*, 14 ARIZ. J. INT'L & COMP. L. 635 (1997); Claus Kreß, *L'organe de facto en droit international public. Réflexions sur l'imputation à l'État de l'acte d'un particulier à la lumière des développements récents*, in 52 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 93 (2001); JÖRN GRIEBEL, *DIE ZURECHNUNGSKATEGORIE DER DE FACTO-ORGANE IM RECHT DER STAATENVERANTWORTLICHKEIT* (2004).

47. *Draft Articles*, *supra* note 32, arts. 26, 50(1)(d).

48. *Id.* art. 20.

49. *Id.* art. 45.

to take into account such individual consent. In this context the Commentary makes the particularly relevant remark that although beneficiaries of human rights treaties cannot waive those rights, "the individual's free consent may be relevant to their application."⁵⁰ This again shows the complexity of invoking state responsibility for acts of intelligence gathering. For instance, states could have pressed informants to cooperate in order to avoid severe disadvantages or even personal harm. Investigations and control mechanisms may be difficult to implement and often unsuccessful.

B. Self-Defense

A claim of self-defense as a justification for intelligence activities may preclude the wrongfulness of such activities, provided the self-defense was lawful and in conformity with the UN Charter.⁵¹ In recent practice, actors have abused the notion of self-defense, thus creating an area of controversy. Furthermore, the argument of self-defense is unavailable with respect to certain obligations, as rightly confirmed in the Commentary.⁵² For instance, all parties to an armed conflict must comply with international humanitarian law and human rights obligations under all circumstances. Intelligence gathering will be wrongful when states conduct it in breach of such provisions.

C. Countermeasures

Victims of an internationally wrongful act⁵³ may declare intelligence activities to be countermeasures or "reprisals" against the offending state. In such cases, again, states cannot waive fundamental rules of human rights and humanitarian protection. As international law prohibits reprisals against persons protected under the law of armed conflict, and also outlaws them in peacetime international relations,⁵⁴ there will be little room to preclude the wrongfulness of an act under this argument.

D. Necessity

A state may invoke necessity as a ground for precluding the wrongfulness of an act only under extreme circumstances. The act must be the only means for the state to safeguard an essential interest against a grave and imminent peril, and it may not seriously impair the essential and

50. CRAWFORD, *supra* note 32, at 165.

51. *Draft Articles*, *supra* note 32, art. 21.

52. CRAWFORD, *supra* note 32, 166.

53. *Draft Articles*, *supra* note 32, arts. 22, 49–54.

54. See G.A. Res. 2625 (XXV), *supra* note 18.

lawful interests of other states.⁵⁵ Furthermore, some international obligations exclude the possibility of invoking necessity altogether. This may be the case under international humanitarian law, where only exceptional rules expressly provide for such possibility, whereas the law of armed conflict generally balances military necessity with the requirements of humanity. Also, a state cannot invoke necessity if it has contributed to the situation that gave rise to the claim in the first instance.

After September 11, states stretched the concept of necessity to justify doubtful means of investigation in a number of cases.⁵⁶ In the United States, the Joint Resolution of Congress of September 14, 2001⁵⁷ paved the way for foreign military operations that go far beyond law enforcement with the consent of the receiving state and that under the norms of international law clearly require a state of armed conflict. Similar cases in the past include President Ronald Reagan's decision in 1986 to bomb Muammar Qaddafi's residence in Libya in response to a terrorist attack that killed several U.S. soldiers in a Berlin discotheque and President Bill Clinton's decision in 1998 to use cruise missiles against a pharmaceutical factory in Sudan in response to terrorist attacks on the U.S. embassies in Dar-es-Salaam and Nairobi. After September 11, for acts committed outside the scope of military operations in armed conflict, the United States considered⁵⁸ amending Executive Order 12,333, which prohibits direct and indirect participation in assassination by the U.S. government and its employees,⁵⁹ although it did not formally pursue this option. In an effort to increase its capacity to gather intelligence on terrorists, the United States lowered existing limitations on the recruitment of spies with suspicious or criminal backgrounds for intelligence operations. It also reconsidered the traditional exclusion of journalists,⁶⁰ clergymen, academics, and Peace Corps and USAID workers from such recruitment. While such developments often failed to provide convincing

55. *Draft Articles*, *supra* note 32, art. 25.

56. See Frederick P. Hitz, *Unleashing the Rogue Elephant: September 11 and Letting the CIA be the CIA*, 25 HARV. J.L. & PUB. POL'Y 765 (2002); HEYMANN, *supra* note 12, at 61–84, 133–57; Ronald D. Lee & Paul M. Schwartz, *Beyond the "War" on Terrorism: Towards the New Intelligence Network*, 103 MICH. L. REV. 1446, 1463–81 (2005).

57. Joint Resolution to Authorize the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States, Pub. L. No. 107-40, 115 Stat. 224 (2001).

58. See William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667 (2003); see also HCJ 769/02 Pub. Comm. Against Torture in Israel and Palestinian Soc'y for the Prot. of Human Rights and the Env't v. Israel et al. [2006] (Isr.), available at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf.

59. Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981).

60. See Intelligence Authorization Act for Fiscal Year 1997, Pub. L. No. 104-293, § 309, 110 Stat. 3461, 3467 (codified at 50 U.S.C. §§ 403–07).

examples of success in the fight against terrorism, they may have invited intelligence services in other countries to introduce even less scrupulous methods.⁶¹

There are better examples of state activities that may serve as a model for other states in the fight against terrorism. As early as 1992, Germany introduced Section 98 into its Criminal Procedure Code,⁶² allowing computerized comparison of personal data on presumed characteristics of perpetrators with other data in order to exclude individuals not under suspicion or to identify individuals who meet other characteristics significant to the investigations. This professional data mining has proven highly effective. The law strictly limits the process to prosecution of certain severe crimes, it respects fundamental rights guaranteed by the Constitution, and it convincingly excludes the use of collected personal data for any other purpose. Germany recently went further with the new Law to Establish Common Data of Police and Intelligence Agencies of the Federation and the States.⁶³ It facilitates the use of existing data for the prosecution of severe crimes and defines obligations of intelligence agencies to cooperate with the police in the fight against international terrorism. Marking the limits of lawful data mining, the Federal Court of Justice decided on January 31, 2007 that covert online search activities in personal computers would require authorization by a legislative act which so far is not available at the federal level.⁶⁴

E. *Sovereign Immunity*

Even beyond the exemptions expressly enumerated in the Draft Articles on the Responsibility of States, states might also refer to specific

61. See ANDREAS VON BÜLOW, *IM NAMEN DES STAATES. CIA, BND UND DIE KRIMINELLEN MACHENSCHAFTEN DER GEHEIMDIENSTE* (1998); ANDREAS VON BÜLOW, *DIE CIA UND DER 11 SEPTEMBER. INTERNATIONALER TERROR UND DIE ROLLE DER GEHEIMDIENSTE* (2004); STEPHEN GREY, *GHOST PLANE. THE TRUE STORY OF THE CIA TORTURE PROGRAM* (2006).

62. Strafprozeßordnung [StPO] [Code of Criminal Procedure], Sept. 12, 1950, BGBl. 1950 at 455, 512, 629, *as amended by* Gesetz zur Bekämpfung des illegalen Rauschgifthandels und anderer Erscheinungsformen der Organisierten Kriminalität [OrgKG] [Law to Combat Illegal Drug Trafficking and Other Forms of Organized Crime], July 15, 1992, BGBl. I at 1302, art. 3, § 3 (F.R.G.), *available at* <http://dejure.org/gesetze/StPO/98a.html>.

63. Gesetz zur Errichtung Gemeinsamer Dateien von Polizeibehörden und Nachrichtendiensten des Bundes und der Länder [Gemeinsame-Dateien-Gesetz] [Law to Establish Common Data of Police and Intelligence Agencies of the Federation and the Länder], Dec. 30, 2006, BGBl. I at 3409, *available at* <http://www.bgblportal.de/BGBL/bgbl1f/bgbl106s3409.pdf>.

64. See Bundesgerichtshof [BGH] [Federal Court of Justice], Jan 31, 2007, StB 18/06 (F.R.G.), *available at* <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2007&Sort=3&nr=38779&linked=bes&Blank=1&file=dokument.pdf>.

norms, such as sovereign immunity, functional immunity of personnel, and immunities of warships and other government ships in attempts to justify intelligence activities. Yet the relevance of these principles to persons and objects involved in covert action is not always clear. A “foreign State need not be granted immunity with regard to objects it had brought into the forum State in violation of the forum State’s territorial sovereignty (e.g. warships entering territorial seas in violation of international law or instruments of espionage).”⁶⁵ States must respect the sovereign rights of receiving states and transit states.⁶⁶ Under international law, no state can rely on an “intelligence exception.”⁶⁷ Furthermore, specific restrictions may apply to flights over foreign territory and even the high seas.⁶⁸

IV. CRIMINAL PROSECUTION OF SPIES

The criminal prosecution of spies is predominantly a matter of national law of the affected state. While espionage is not an international crime, most national legal systems provide for the prosecution and punishment of treason and espionage, without making much distinction between acts committed in wartime or in peacetime. The same applies to crimes committed in connection with espionage, such as violation of human rights, bribery, robbery, drug trafficking, illegal weapons proliferation, and intrusion on protected data. Many states even penalize the collection of unclassified national security information, when done in a covert manner, as this may fulfill the elements of espionage under the law of the state spied upon. States often do not insist on punishment of particular perpetrators but instead expel or exchange them for intelligence personnel they have employed themselves.

65. Helmut Steinberger, *State Immunity*, in 4 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 615, 630 (Rudolf Bernhardt ed., 2000) (referring to Articles 32, 95, and 96 of UNCLOS); see also Jörg Manfred Mössner, *Spionage und Immunität von Kriegsschiffen*, 35 *NEUE JURISTISCHE WOCHENSCHRIFT* 1196 (1982).

66. Council of Europe—European Commission for Democracy Through Law (Venice Commission), *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detentions Facilities and Inter-State Transport of Prisoners*, 66th plen. sess., CDL-AD(2006)009 (Mar. 17–18, 2006), available at [http://www.venice.coe.int/docs/2006/CDL-AD\(2006\)009-e.pdf](http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.pdf).

67. Anthony Dworkin, *The CIA Exception: Can Intelligence Agents Subject Detainees to Inhuman and Degrading Treatment?*, *CRIMES OF WAR PROJECT*, Feb. 2, 2005, <http://www.crimesofwar.org/news-CIA.html>.

68. Convention on International Civil Aviation art. 12, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295.

A. International Legal Aspects

Although the field of national security provides the main reasons for criminalizing acts of espionage, international considerations affect prosecution and court procedures as well. Principles and provisions of international law require penal sanctions in the case of gross human rights violations and grave breaches of the Geneva Conventions. Amnesty International has called for the prosecution of anyone suspected of having committed, ordered, or authorized rendition or any other human rights violations connected to such practice, including forced disappearance, torture, or ill-treatment.⁶⁹ Amnesty also has urged states that they must conduct all prosecutions in proceedings which meet international standards of fairness. Amnesty convincingly maintains that states should impose sentences that are commensurate with the gravity of the crime, but without recourse to the death penalty. It must, indeed, be deplored that perpetrators of such crimes still enjoy impunity in many states and that national criminal procedures are not always in line with international legal requirements.⁷⁰

B. The German Experience

Legal cases concerning the prosecution of spies after the German unification extensively considered international legal aspects of espionage. During the 1990 negotiations between East and West Germany, the two states could not reach an agreement on a possible amnesty for members of the former East German secret service (the Stasi). Many people in both parts of the country opposed any sign of conciliation with this particular organization. The German Unification Treaty⁷¹ provides that for the prosecution of crimes committed prior to unification, the law of the Federal Republic would apply. This led to the continued prosecution of espionage committed in favor of the former German Democratic Republic, irrespective of whether the permanent residence of the

69. Amnesty Int'l, *The Secretive and Illegal US Programme of "Rendition"*, <http://web.amnesty.org/pages/stoptorture-050406-feature-eng>.

70. A temporary committee of the European Parliament issued a report that suggests that a number of EU governments knew of the U.S. detention program. *See Report of the Temp. Comm. on the Alleged Use of Eur. Countries by the CIA for the Transp. and Illegal Det. of Prisoners*, EUR. PARL. DOC. A6-0020/2007 (2007), available at http://www.europarl.europa.eu/comparl/tempcom/tdip/final_report_en.pdf.

71. Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschland vom 31. August 1990—Einigungsvertrag—(Anlage I, Kapitel III, Sachgebiet C, Abschnitt II Nr. 1b) [Treaty between the Federal Republic of Germany and the German Democratic Republic on the Establishment of German Unity (Unification Treaty)], Aug. 31, 1990, BGBl. II at 885, reprinted in PRESSE- UND INFORMATIONSAMT DER BUNDESREGIERUNG, *translated in THE UNIFICATION OF GERMANY IN 1990, A DOCUMENTATION* (1991).

perpetrator was in East or West Germany. Further attempts within the German *Bundestag* (Federal Diet) in 1990 and 1993 to introduce an amnesty for members of the Stasi were unsuccessful.

German criminal courts dealt extensively with this situation and examined it under various viewpoints. Under Article 25 of the German Constitution,⁷² the general rules of international law are an integral part of the federal law, taking precedence over domestic laws and directly creating rights and duties for the inhabitants of the federal territory. Thus, German courts have to interpret and apply relevant rules of international law. If, in the course of litigation, doubt exists whether a rule of international law is an integral part of federal law and whether it directly creates rights and duties for the individual, the court must obtain a decision from the Federal Constitutional Court under Article 100(2) of the German Constitution. The Federal Constitutional Court confirmed in 1995 that there is no general rule of international law that precludes prosecution for intelligence operations committed on behalf of and from the territory of a state which subsequently, in a peaceful and negotiated process, accedes to the state spied upon.⁷³

The Federal Constitutional Court stated in this case that international law does not prohibit or limit prosecution for peacetime espionage under national law. It noted that spies so prosecuted cannot claim immunity, unless they fall within the provisions of the 1961 Vienna Convention on Diplomatic Relations,⁷⁴ the 1963 Vienna Convention on Consular Relations,⁷⁵ or other special conventions. The Court further noted that so far, no state had invoked the act of state doctrine with respect to espionage activities, and, as this doctrine is confined to the Anglo-American legal tradition, courts could not regard it as a general rule within the meaning of the German Constitution. The Court also considered that no general

72. Grundgesetz [GG] [Constitution] art. 25, *as amended by Gesetz zur Änderung des Grundgesetzes* [Act to Amend the Basic Law], Dec. 20, 1993, BGBl. I at 2089 (F.R.G.), *translation available at* <http://www.iuscomp.org/gla/statutes/GG.htm>.

73. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 15, 1995, 92 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 277 (328) (F.R.G.), *in* 48 NEUE JURISTISCHE WOCHENSCHRIFT 1811 (1995). *See* John Miller, *Settling Accounts with a Secret Police: The German Law on the Stasi Records*, 50 EUR.-ASIA STUD. 305 (1998); Jochen A. Frowein, Rüdiger Wolfrum & Gunnar Schuster, *Völkerrechtliche Fragen der Strafbarkeit von Spionen aus der ehemaligen DDR*, 121 BEITRÄGE ZUM AUSLÄNDISCHEN ÖFFENTLICHEN RECHT UND VÖLKERRECHT (1995); Gunnar Schuster, *Verfassungs- und völkerrechtliche Fragen der Bestrafung von DDR-Spionen nach der Wiedervereinigung Deutschlands*, 51 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [ZaöRV] 651 (1991).

74. Vienna Convention on Diplomatic Relations art. 29, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

75. Vienna Convention on Consular Relations art. 41, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

rule of international law concerned the treatment of those who committed treason or performed covert operations for another state that later acceded to the state spied upon. The law of state succession did not follow general rules, and due to the absence of general state practice, the Court said it could not draw an analogy to Article 31 of the 1907 Hague Regulations Respecting the Laws and Customs of War on Land,⁷⁶ as this provision was part of the law of war, not of peacetime law, and state practice did not support such an analogy. Finally, the Court explained that prosecution in this case would not contravene the principle of *nulla poena sine lege*, enshrined in Article 15 of the International Covenant on Civil and Political Rights and Article 7 of the European Convention on Human Rights, as that rule did not require that an action be punishable under the law of the state of the offender. However, there was a limitation under the principle of proportionality for the prosecution of acts of espionage directed against the Federal Republic that were committed on the territory of the former German Democratic Republic or its allies. Such acts could not be prosecuted, as both states had agreed in the Basic Treaty of 1972⁷⁷ to accept the principle that the jurisdiction of each is limited to its own territory.

This judgment was the subject of vigorous debate, even within the Federal Constitutional Court. Three of the eight judges sitting on the case joined in a dissenting opinion, stating that the Court misinterpreted the principle of proportionality by neglecting severe and continuing damage by spies to the security of the Federal Republic and its institutions.⁷⁸ They also criticized the judgment for honoring the confidence of spies in the continued existence of their state, a confidence that did not deserve legal protection. They argued that the Court used political considerations in lieu of legal arguments, and the judgment resulted in an unacceptable preference for perpetrators who remained on the territory of the former German Democratic Republic as opposed to spies sent to the Federal Republic. Deterring perpetrators from continuing their acts against the Federal Republic in the service of another state required criminal prosecution. While only the legislature had the power to grant a general amnesty, which it had so far refrained from doing, criminal courts appropriately had considered extenuating circumstances, which might lead to milder punishments or impunity in individual cases.

76. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 15, 2005, 92 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 277 (315) (F.R.G.).

77. Vertrag vom 21. Dezember 1972 über die Grundlagen der Beziehungen zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik [Basic Treaty of 1972], June 6, 1973, BGBI. II at 421, art. 6, available at <http://www.bundestag.de/geschichte/parlhist/dokumente/dok07.html>.

78. BVerfGE 92, 277 (328) (Klein, J., Kirchhof, J., & Winter, J., dissenting).

Others have taken similarly critical positions against the judgment. One scholar argued that given the continued need for criminalizing espionage directed against the Federal Republic, an amnesty could not serve any meaningful purpose.⁷⁹ The *Bundestag* has not taken up the amnesty issue again. The European Court of Human Rights, concerned about the length of relevant proceedings before the Federal Constitutional Court in the case of two other applicants, decided in 2000 that Germany had not violated Article 6, Section 1 of the Convention (the right to a fair trial within reasonable time).⁸⁰

Thus, the application of principles and provisions of international law has resulted in the impunity of a small group of spies of the former German Democratic Republic, namely those acting on the territory of the German Democratic Republic or its allies, while those acting on the territory of the Federal Republic were prosecuted. Yet the relevance of this jurisprudence for future cases will be very limited.

V. REPARATIONS FOR WRONGFUL ACTS OF INTELLIGENCE GATHERING

In addition to prosecution of individual perpetrators for treason and espionage under national criminal law, courts may hold states accountable for espionage not only to the target state, but also to individual victims. Where actors commit wrongful acts on behalf of states, justice requires that states must face their responsibility.⁸¹ Victims may also direct their claims against individual perpetrators, but in most cases individuals will be unable to make full reparation, in particular during or after criminal prosecution.

While recent legal developments and political events have led to a revolution in accountability of states for wrongful acts,⁸² the extent to

79. Karl Doehring, *Zur Ratio der Spionenbestrafung – Völkerrecht und nationales Recht*, in ZEITSCHRIFT FÜR RECHTSPOLITIK [ZRP] 293 (1995).

80. *Gast & Popp v. Germany*, 2000-II Eur. Ct. H.R. 487.

81. *Draft Articles*, *supra* note 32, art 27(b).

82. See Chandra Lekha Sriram, *Revolutions in Accountability: New Approaches to Past Abuses*, 19 AM. U. INT'L L. REV. 301 (2003). Also, the International Law Association has recently established a new Committee on Compensation for Victims of War (chair: Dr. Luke T. Lee, American Branch; rapporteurs: Professor Rainer Hofmann, German Branch, and Professor Shuichi Furuya, Japanese Branch). The mandate is as follows:

Innocent civilians are often casualties during armed conflicts, whether or not intentionally targeted. Deprived of effective protection, they are often left without any remedy if they are killed or wounded, or suffer property or other losses. It is time to systematically review the law of war and human rights with a view to focusing on the rights of victims of war to compensation—both to serve the end of justice and to inhibit wanton attack on civilian population by the military, whether or not under

which this relates to intelligence-gathering activities is uncertain. One might view the accountability of a state for intelligence-gathering activities committed on its behalf as a result of the prosecutions of individual actors. But state responsibility does not end with crimes committed by its agents. Rather, it applies to all wrongful acts of the state, including acts that are illegal under international law, even if national law does not criminalize them. Whereas the Draft Articles on the Responsibility of States exclude acts committed by state agents in their capacity as private individuals,⁸³ Article 3 of the Fourth Hague Convention of 1907 and Article 91 of Additional Protocol I cover acts committed by persons who form part of the armed forces in times of war, which gives these latter rules the character of *lex specialis*.⁸⁴

As we have seen above, intelligence activities as such may not be wrongful under present international law, but the wrongfulness may derive from additional conditions, such as illegal intervention, breach of foreign sovereignty, or common crimes committed in the course of espionage acts.⁸⁵ Decisionmakers must consider all wrongful acts when remedies are at issue. Thus, it is appropriate that Amnesty International has demanded that judicial or other mechanisms guarantee full reparation to the victims of rendition or any other human rights violations connected to such practice, including forced disappearance, torture, or ill treatment.⁸⁶

Current international law imposes no obligation to make reparations, except for internationally wrongful acts. This may be a problem in cases in which acts of intelligence gathering that are not lawful *per se* have caused “collateral” damage that may include severe losses in individual cases. As a matter of sound policy, states should include such losses in their efforts to make full reparation. In this context, it is clear that states

superior order. The proposed project would have as its goal the preparation and adoption of a Draft Declaration of International Law Principles on Compensation to Victims of War, as a logical sequel to three ILA declarations already adopted: namely, on Mass Expulsion (Seoul 1986), Compensation to Refugees (Cairo 1992), and Internally Displaced Persons (London 2000). Underlying all these declarations is the principle that compensation must, under international law, be paid to victims of human rights abuses.

Committee News, ILA Newsl. No. 18, 2003, at 6, <http://www.ila-hq.org/pdf/Newsletter/ILA%20Newsltr%2018.pdf>. See also RAINER HOFMANN & FRANK REIMANN, INT’L LAW ASS’N, COMM. ON COMPENSATION FOR VICTIMS OF WAR, COMPENSATION FOR VICTIMS OF WAR: BACKGROUND REPORT (2003), available at <http://www.ila-hq.org/pdf/Compensation%20for%20Victims%20of%20War/Background%20ReportAugust2004.pdf>.

83. *Draft Articles*, *supra* note 32, art. 7.

84. *Id.* art. 55.

85. *Supra* text accompanying note 25.

86. See Amnesty Int’l, *supra* note 69.

are accountable for intelligence gathering not only to the target state, but also to individual victims, and not the least to agents they deploy. This observation was made decades ago,⁸⁷ and it is still of importance. Forms of reparation include restitution, compensation, rehabilitation, satisfaction, and guarantees of nonrepetition. If the case demands, the offender must pay compensation.⁸⁸

VI. CONCLUSIONS

The question of whether and to what extent intelligence-gathering activities are wrongful *per se* remains ambivalent in international law. International law clearly prohibits intelligence gathering if coupled with additional elements, such as illegal intervention, breach of foreign sovereignty, or common crimes. Politicians committing or authorizing such wrongful acts must face individual and state responsibility, and democratic constituencies must remind them of this responsibility, if the rule of law is to remain meaningful. Further limits on peacetime espionage could derive from the legal principles of confidence building and good cooperation between states, but such limits are still undeveloped. Drawing a bright line for intelligence operations is difficult even under the law of armed conflict, which protects spies in a limited way. Yet prohibitions on certain acts in peacetime may be of continued relevance in wartime—a prospect that deserves further exploration.

Those involved should make further efforts to increase cooperation between relevant services in the interest of effective results and professional intelligence evaluation. States should foster civil-military cooperation to make intelligence products available wherever they are needed for good governance, assist courts and prosecutors, and improve legislative oversight.

The attribution of acts of intelligence gathering to a state largely depends on the control that state exercises. While it may be disputed whether detailed and effective control is essential for this purpose, the requirement appears to be fulfilled where states plan, execute, and fund an act on the basis of distinct policy directives, such as domestic law enforcement powers to better pursue a terrorist target.

While some circumstances may preclude the wrongfulness of a specific act of intelligence gathering under international law, violations of human rights or international humanitarian law do in any case constitute wrongful acts. In certain situations, the principle of necessity justifies

87. Leslie S. Edmondson, *Espionage in Transnational Law*, 5 VAND. J. TRANSNAT'L L. 434, 435 (1972).

88. See G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006).

data mining and cooperation between intelligence and police agencies in the use of personal data for the prosecution of severe crimes.

International law does not influence criminal responsibility in every respect, as national law may provide punishment even for the collection of unclassified information, when done in a covert manner on foreign territory in a way that fulfills the elements of the crime of espionage under the law of the state spied upon. Yet principles and provisions of international law require penal sanctions in the case of gross human rights violations and grave breaches of the Geneva Conventions. In the special situation of the German unification in 1990, international legal issues were extensively considered in proceedings against spies of the former German Democratic Republic. Yet the consequences of this jurisprudence for future cases may be limited.

As individuals will generally be unable to make full reparation to victims of intelligence gathering, state responsibility is most important for the victims of wrongful acts. State responsibility goes beyond criminal action and applies to all wrongful acts of a state. As a matter of sound policy, states should make reparations to individuals for “collateral” damage as well, and the rule of law cannot recognize any “intelligence exception.”