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Introduction

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INTRODUCTION

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The articles in this symposium issue of the *Michigan Journal of International Law* represent the product of a historic and path-breaking conference held at the University of Michigan Law School in February 2007. The two-day meeting brought together an extraordinary array of scholars and practitioners to examine closely the relevance of international law for the gathering of intelligence by states. Although this long-neglected topic has gained increased relevance since the use of more controversial intelligence-gathering methods by the United States as part of its “global war on terror,” many of the legal issues are as old as the craft of intelligence itself.

The challenge to international lawyers posed by intelligence gathering is somewhat daunting: How can international norms, processes, and institutions possibly play a role in regulating an activity that by its very nature is so secret that states deliberately reveal very little about how they carry it out? This obstacle has both a foundational and a practical element. As a matter of the foundations of international law, we know that customary international law emerges as states engage in a consistent practice of activity over time and do so with a sense that the law obligates or permits them to do so. Students of international law determine custom by looking at such practice and attitudes, including the reactions—protest or acquiescence—when certain states make claims about what the law obligates or allows. A similar process is engaged with the application and interpretation of treaties, where, if the treaty’s text does not provide a clear answer, we look to the ongoing practice of states as the strongest evidence of its meaning.

With intelligence gathering as well as covert action—the other component of that shadowy world—all the evidence of law is secret. How can we possibly even know how states are interpreting a treaty, or what they regard as a norm of custom, if they will not acknowledge what they are doing or whether and how they believe it is legal? Even if a state has an interest in acting according to law, it will not publicly reveal its interpretation and in many cases will have reasons to avoid public protest of claims by other states that it rejects.

Beyond the theory or doctrine of international law, as a practical matter it is hard to see how states will cooperate on creating an international legal regime to govern intelligence activities. The construction of norms and institutions is a cooperative exercise that assumes both a common goal and a set of institutionalized processes to come to agreement, often

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(though certainly not always) transparent to the public. With intelligence gathering, those states with the capacity to carry out this activity tend to regard it as so central to their national survival that they might be unwilling to cooperate on a global regime (though bilateral cooperation would prove much easier). How can states even agree on what is allowed and prohibited if they refuse to talk together about what they do?

These two challenges manifest themselves in numerous areas of international law that should regulate intelligence gathering, from the use of force to diplomatic immunity to human rights. For example, intelligence gathering by one state in the territory of another could run afoul of the UN Charter's ban on the use of force, as it can involve unconsented breach of a state's territorial integrity. Similarly, the electronic eavesdropping that a number of states undertake of embassies and consulates on their territory seems to violate the immunity of foreign missions that is a core part of diplomatic law.

Despite these obstacles, the conference showed that international law has functioned and can function to regulate intelligence gathering. But of course it does not regulate intelligence gathering in the same way it does other activities. Much of the regulation relies on the good faith of lawyers within intelligence agencies in interpreting international law, a trait that cannot be guaranteed when clients put strong pressures on them for the "right" answers. Sometimes, particularly glaring acts will be made public, and the reactions of states to the news will tell us something of their attitudes. The processes are manifold but are certainly unlikely to involve courts, whether domestic or international.

In the papers that follow, readers are invited to explore the range of issues that are part of this rich and underexamined subject. Jeffrey Smith's keynote address examines the constraints that U.S. lawmakers, at the time acting out of concern for international norms—or at least ramifications—have put on the executive branch's intelligence-gathering and covert action capacity.¹ He emphasizes the important role of lawyers in ensuring fidelity to domestic and international law and cited repeated failures of lawyers and policymakers to live up to those standards in recent years. Simon Chesterman approaches intelligence gathering broadly, addressing the rule of law in times of crisis.² Chesterman underscores the pitfalls of allowing extra-legal measures in the face of such crises or relying on *ex post facto* ratification of the measures. Charles Garraway shows the complex interrelationship between international human rights law and international humanitarian law, especially since

1. Jeffrey H. Smith, *Keynote Address*, 28 MICH. J. INT'L L. 543 (2007).

2. Simon Chesterman, *Secrets and Lies: Intelligence Activities and the Rule of Law in Times of Crisis*, 28 MICH. J. INT'L L. 553 (2007).

the declaration of the “global war on terror.”³ And John Radsan offers a provocative and original take on the netherworld between the legal and illegal in which intelligence gatherers operate, showing that we all must understand the shades of gray to see a role for law.⁴ Glenn Sulmasy and John Yoo offer a more skeptical perspective, finding little role for international law in the regulation of intelligence gathering and arguing that such regulation could perversely lead to more frequent conflicts or war.⁵

Judge James Baker’s contribution brings home the hard work of the lawyer advising policymakers and intelligence gatherers about the limits of what they can do.⁶ He eloquently describes the imperatives facing the United States—the balance between finding “actionable” intelligence, on the one hand, and the protection of civil liberties under the Constitution and a commitment to international law, on the other. He shows how the lawyer must be scrupulous not to let either demand cause him to offer legal advice that will seem to satisfy the client in the short term but will prove harmful to U.S. interests in the long term.

Francesca Bignami’s contribution concerns the interaction of intelligence gathering with human rights, particularly the assaults upon personal privacy that are part of some intelligence-gathering activities.⁷ Bignami advocates the “redesign” of transnational intelligence-sharing networks with greater attention to the right to privacy, based on a European model of commonly shared, multilateral standards for the use and transfer of intelligence information affecting individual privacy.

Finally, in discussing the links between state responsibility and intelligence gathering, Dieter Fleck offers a history of the approach to espionage in various bodies of international law and the means by which states could be held responsible for illegal acts.⁸

The editors of the *MJIL* have thus provided a unique contribution to the study of international law. Many involved in intelligence gathering will continue to resist calls for open scrutiny of their work, but some public knowledge is necessary for a functioning democracy. We

3. Charles H.B. Garraway, *State Intelligence Gathering: Conflict of Laws*, 28 MICH. J. INT’L L. 575 (2007).

4. A. John Radsan, *The Unresolved Equation of Espionage and International Law*, 28 MICH. J. INT’L L. 595 (2007).

5. Glenn Sulmasy & John Yoo, *Counterintuitive: Intelligence Operations and International Law*, 28 MICH. J. INT’L L. 625 (2007).

6. James E. Baker, *What’s International Law Got to Do with It? Transnational Law and the Intelligence Mission*, 28 MICH. J. INT’L L. 639 (2007).

7. Francesca Bignami, *Towards a Right to Privacy in Transnational Intelligence Networks*, 28 MICH. J. INT’L L. 663 (2007).

8. Dieter Fleck, *Individual and State Responsibility for Intelligence Gathering*, 28 MICH. J. INT’L L. 687 (2007).

can all hope that this is only the first of such conferences and that those implementing states' intelligence-gathering capacities will pay heed to the insights offered here.