

THE UNIVERSITY OF CHICAGO

**Spying for Peace:  
Explaining the Absence of the  
Formal Regulation of Peacetime Espionage**

By

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## Abstract

Despite vocal protestations when states are spied upon, current international relations literature does not explain why states do not formally regulate peacetime espionage. In this paper, I argue that states do not regulate peacetime espionage through formalized international law for five main reasons: (1) lack of enforceability, (2) regulation of high-stake security issues like being spied upon by another state will create a very short shadow of the future, (3) espionage is very closely linked to state security and survival and therefore the penalty for unilateral cooperation is very high if the other party defects, (4) formal regulation would affect stronger states differently than weaker states, and (5) states recognize the benefits of tolerating some forms of relatively benign spying on themselves during peacetime because of the general recognition that reducing private information – including that related to misunderstood intentions – contributes to stability. I argue that since espionage allows states to determine and verify the intentions of other states and that knowing the intentions of other states builds trust and cooperation, espionage is thus an instrument for stability and peace. I conclude that because any attempt at regulating espionage would remove this tool of states to determine actual intentions, any formal regulation of peacetime espionage would breed distrust, misunderstanding, and destabilization of the current relationship between states.

“It is hard to believe that a man is telling the truth  
when you know that you would lie if you were in his place.”  
- H. L. Mencken

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## Introduction

States have spied on one another even before the Westphalian system was established in 1648. Five thousand years ago, Egypt had a well-organized secret service to inform the pharaoh and his advisers of the plans of the enemy. In 1430, Joan of Arc was betrayed by an English spy. In *Hamlet*, Shakespeare wrote that while spies cannot cause damage by themselves, the army that follows the spy can: ‘When sorrows come, they come not single spies/but in battalions.’<sup>1</sup> Whether it was during a war, or during an era of peace, states have spied: “there has never been a war without spies, and there never has been a peace in which spies have not engaged in preparations for a future war.”<sup>2</sup>

Espionage can and often does bring to light some of the deepest secrets of states. States have a strong “desire to hide vital information about national capabilities and intentions. In a dangerous world, there are powerful incentives to conceal and deceive.”<sup>3</sup> Because there are these incentives, these “illegal” infringements of security are, at the very least, loudly protested and are invasions of state security and even can be considered acts of war.

Almost all states, Western or non-Western, democratic or non-democratic, engage in espionage. *All* states, at the very least, would loudly protest such violations of their security and sovereignty. Yet, no state has ever proposed formally curtailing or eliminating espionage. If states are truly angry at being spied upon, why has no state ever proposed a serious and practical solution to rectify the supposedly “dangerous”, “unlawful”, “unfriendly” and “unstable” practice of espionage? In this paper, I will argue that because espionage allows states to determine and verify the intentions of other states, and since knowing the intentions of other states builds trust and cooperation, espionage is, despite its official universal condemnation on moral or sovereignty grounds, an instrument for stability and peace. I will also argue that, because any attempt at regulating espionage would encroach on the ability of states to determine actual intentions, any formal regulation of peacetime espionage would breed distrust, misunderstanding, and destabilization of the current international system.

Because clear and precise definitions are required to ensure clarity and uniform understanding, in the next section I will define a series of terms that will be used throughout this paper. In the second section, I will examine the differences between the regulation of both wartime and peacetime espionage and I will explain why wartime espionage is treated through formalized international law and why peacetime espionage is dealt through customary norms.

In the third section, I offer five reasons why peacetime espionage is not regulated through formalized international law, specifically: (1) the inability to enforce such

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<sup>1</sup> Shakespeare, William. *Hamlet*. Act iv. Sc. 5, 78-79

<sup>2</sup> Singer, Kurt. *Three Thousand Years of Espionage*, Prentice-Hall Inc., 1948.

<sup>3</sup> Lipson, Charles. *Reliable Partners: How Democracies Have Made a Separate Peace*. Princeton University Press, 2005. Page 98

regulation, (2) the short shadow of the future, (3) the penalty for unilateral cooperation is high, (4) different effects of formal regulation on stronger vs. weaker states, and (5) states understand that espionage, despite public lip service, is a key instrument in reducing private information and therefore any overt restrictions on espionage would be inherently destabilizing. In the fourth section, I discuss the probable impact that this research will have on two areas of international relations literature, including the rationalist causes of war and democratic peace theory. The paper concludes by (1) illustrating that there is a correlation between the peaceful intentions of a state and its willingness to tolerate, *albeit* privately, some intrusion into its own national secrets as a price for reducing misunderstanding and tensions, increasing stability and minimizing the chances for avoidable war, and (2) arguing that any formalized regulation of peacetime espionage is unlikely, unwise, and dangerous to peace and stability.

## Defining Terms

Throughout this paper, I will be discussing terms that have wildly dissimilar definitions to different people. Since these terms are extensively used in this paper, one standard definition must be supplied in order to ensure common understanding and decrease the possibility of misinterpretation.

The first term that must be defined is, of course, “espionage.” While espionage and “spying” commonly conjure up images of Ian Fleming’s James Bond, this is hardly a real portrayal of espionage-in-action. Espionage, as defined in this paper, is the practice of procuring secret or classified information from an enemy or rival state.<sup>4</sup> While espionage is almost always covert, it does not necessarily have to be so; during the Cold War, American satellites and U-2s were openly used for espionage but were presumed – sometimes erroneously – to be beyond Soviet capabilities to destroy or otherwise affect.

Additionally, espionage in this paper will *only* pertain to the procurement of intelligence, i.e., intelligence-gathering, and not other state actions that are sometimes incorrectly conflated with espionage such as paramilitary actions or political subversions (assassinations, *coup d’états*, or the tampering of elections). Also, since this paper is solely concerned with espionage for national security purposes, commercial espionage (better known as industrial espionage) is excluded from this discussion.

Procurement of intelligence can occur two ways, either HUMINT or SIGINT. HUMINT, or HUMAN INTelligence, occurs when the victim-state’s citizens are covertly recruited by another state to become moles and defectors. SIGINT, or SIGNALS INTelligence, is intelligence covertly gleaned from spyplanes, surveillance satellites, and other forms of electronic monitoring. Both HUMINT and SIGINT are types of espionage that are discussed in this paper.

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<sup>4</sup> A “rival state” as defined in Realist literature is either an actual rival or a potential rival. Therefore, a rival state can be either an ally or a hostile state.

For simplicity's sake, states that are conducting spying will be labeled, without necessarily offering a moral judgment, as "spying states," and states that are spied upon will be labeled as "target states". "Spies" include crew members on a boat or airplane that is conducting surveillance and are also citizens of a targeted state that are recruited by citizens of a spying state to become a mole or defector.<sup>5</sup> Because domestic laws treat citizens different from non-citizens, this paper will refer to citizens that become spies as "national spies" and non-citizen spies as "foreign national spies." For example, Jonathan Pollard was a national spy while Francis Gary Powers was a foreign national spy.

"Private information" is any information that is secret, classified or otherwise unknown; this may include a wide variety of information such as weaponry or military plans, the intentions of political or military leaders or even the allocation of power among elites. The collection of private information is the objective of espionage and as such, the term private information will be used extensively throughout this paper. Asymmetric information is a situation in which two parties have different (asymmetric) levels of information.

The final terms that must be defined are "customary" norms versus "treaty" or "formalized" laws. Customary norms have been developed through the ongoing and historical exchanges between states over time and therefore are deemed to be normative or were developed through an objectively recognizable, but usually unstated, rule of precedent-by-experience (i.e., a form of common law). These historical precedents, which at least provide a flexible methodology, may assist states in carrying out their affairs in accordance with prior relations which were tolerated by the involved or other similarly situated parties. Formalized laws are different because they are expressively codified and agreed to<sup>6</sup> by all parties; as such, formalized laws are theoretically more enforceable and are subject to more precise description than customary norms. Both customary norms and formalized laws are discussed in the following section.

## Duality of Wartime Espionage vs. Peacetime Espionage

The act of wartime or peacetime espionage is not regulated. There is no law, treaty, norm, or custom that dictates what can be and what cannot be spied upon. The legal difference in regulation between wartime and peacetime espionage lies within what happens with captured spies. During wartime, the capture of spies is formally

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<sup>5</sup> A "mole" is a citizen who is recruited to commit espionage on his/her own state and while committing espionage remains in his/her position of power and/or access while supplying the spying state with information. With regards to espionage, a "defector" differs from a mole in that a defector has information and in return for the information is supplied with safe passage to, and permanent asylum in, the spying state. A mole may eventually become a defector.

<sup>6</sup> Reservations and Amendments to treaties are still very common, yet unlike customary norms these deviations from the norm are – indeed, must be – *publicly affirmed*. In customary norms, the parties may dispute whether the behavior is customarily accepted; this, of course, adds a layer of potential confusion and argument during a period of heightened emotions which may make resolution more difficult.

regulated through the laws of war; during peacetime, the capture of spies is informally regulated through five customary norms.

During wartime, spying is generally assigned to the military (and not a civilian agency) largely because the target data is usually of anticipated direct and immediate military significance. When one warring state spies upon another warring state, those spies are covered under the Geneva Conventions. Uniformed soldiers *without disguises* who are in a war zone for the purpose of covertly gathering or delivering information are, by treaty definition<sup>7</sup>, *not* spies and, if captured, are to be afforded ordinary POW status. A spy, to the contrary, is defined as one who “when, acting clandestinely or on false pretences...obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.”<sup>8</sup> The laws of war make no distinction between national spies and foreign national spies; it is assumed that national spies are afforded the normal domestic consequences for espionage, i.e., treason.

All accused spies are formally afforded the right to a trial before punishment<sup>9</sup> (which includes execution); however, due to secrecy concerns – we are discussing wartime espionage after all – accused spies have “forfeited [the] rights of communication.”<sup>10</sup> Furthermore, accused spies “shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State”; this loophole explicitly grants states wide discretion to deny the accused spy due process consistent with the target state's established legal tradition.<sup>11</sup> The Geneva Conventions dictate that the accused spy should “be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State.”<sup>12</sup> It is doubtful, however, that the accused spy's punishment would have been

<sup>7</sup> “...soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies.” *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, 1907. Section II, Chapter II, Article 29.

<sup>8</sup> *Ibid.*

<sup>9</sup> “A spy taken in the act shall not be punished without previous trial.” *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, 1907. Section II, Chapter II, Article 30.

<sup>10</sup> *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, 1949. Part I, Article 5.

<sup>11</sup> *Ibid.*

<sup>12</sup> “Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State. Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention. In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.” *Ibid.*

delayed until that occurs; the historical punishment for wartime espionage, after all, is death.<sup>13</sup>

The laws of war, of course, constitute formalized regulation. Peacetime espionage, on the other hand, is regulated by the target states' applicable domestic laws, customary norms and the current domestic and international political situation. The capture of spies is regulated by the domestic laws of the target state – and the will of the government of the state<sup>14</sup> – and is also regulated by customary norms.

The five customary norms of the capture of spies during peacetime are based on an examination of norms derived from failed (exposed) cases of peacetime espionage and are unacknowledged and unstated customary norms. They are as follows:

- (1) **Location is Paramount:** Spying in international areas does *not* violate international law. Infringing upon state's territory violates both domestic and international laws and, as such, a spy is subject to the usual domestic consequences. The response to overflights or other technological invasions of territory are determined by the ability of the target state to take definitive action to defeat such remote intrusions;
- (2) **The Lack of Enforcement of International Law:** Espionage during peacetime, regardless if performed by the uniform military or a civilian agency, is expressly prohibited by well-established international law, but still occurs without substantial or permanent punishment to the spying state;
- (3) **The Forfeiture of Technology:** Any equipment apprehended in the course of capturing a spy is fair game to permanent seizure, close inspection and reverse engineering;
- (4) **The Fate of Spies is Directly Linked to the Amount of Media Attention:** When the espionage has been exposed to widespread public knowledge, the

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<sup>13</sup> In June 1942 during World War II, the FBI caught eight would-be Nazi saboteurs that had entered the United States through New York and Florida. This incident was publicized throughout the United States in order to demonstrate Nazi "immorality" for spying. The spies were arrested and these out-of-uniform agents were given military trials. Six were executed while the other two were imprisoned. After the war in 1948, the two imprisoned would-be saboteurs were given clemency by President Truman and deported to the American Zone of Germany. This is a remarkable case for several reasons; not only were out-of-uniform saboteurs caught on American soil during wartime, but they were allowed to go through a formal military trial and they were not all summarily executed. Indeed, the fact that not all of the would-be saboteurs were sentenced to death reaffirms that the United States did not deviate from her domestic laws just because it was wartime. This may be seen in stark contrast to the Bush II Administration's position that foreign combatants (alleged terrorists), captured abroad by ordinary American military troops and held by the U.S. are not entitled to any due process.

<sup>14</sup> For example, despite being sentenced to three years of imprisonment and seven years of hard labor for espionage, Francis Gary Powers was released after only 21 months in February 1962. This release was only made possible because it was part of an exchange for Soviet KGB Colonel Vilyam Fisher (better known as Rudolf Abel). In this case, despite being sentenced according to the laws of the Soviet Union, his sentence was reduced because it served the will of the government.

spying nation should expect the return of its prisoners after a decent interval for propaganda, including possible show trials. This release will occur in conjunction (admitted or not) with a prisoner exchange or for the final propaganda value of making a "humanitarian" gesture of release, usually with an apology or acknowledgment that does not necessarily have to be truly heartfelt or sincere by the spying state and/or the spies themselves. This "apology" still provides the target state the ability to assert, particularly for domestic or other friendly audiences, that it was the victim;

- (5) **The Fate of Anonymous Spies:** When a failed espionage mission has not been exposed to the public, usually in less-free societies, foreign spies may be captured and held in prison for decades or simply be executed, possibly under color of domestic law, depending on applicable domestic laws and/or customs.<sup>15</sup>

During peacetime, it is generally expected that states will follow customary norms or, because of broader policy objectives, at least will be amenable to negotiation, direct or through third parties (mediation), to reach a temporary *modus operandi*. The above five customary norms help guide states in resolving conflicts with captured spies during peacetime. However, during wartime states are inherently less trusting so there is a common self-interest in formalization to afford some protection, in the event of some future war, to each state's own spies. Therefore, spies are *formally* covered by the laws of war.

It is important to note, however, that the regulation of wartime and peacetime espionage is *limited* to how states will treat captured spies. There is *no* regulation of either wartime or peacetime espionage with regard to what can be spied upon.<sup>16</sup> The reasons for the absence of the formalized regulation of peacetime espionage are discussed in the following section.

## Explaining the Absence of Formalized Peacetime Espionage Regulation

Even though states loudly protest when they are spied upon, no state has mounted a serious push for formal regulation of peacetime espionage, such as banning or curtailing espionage. There are five reasons why states spurn the formalized regulation of peacetime espionage.

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<sup>15</sup> Kapp, Michael. "Peacetime Espionage: How international law helps resolve the peacetime capture of spies," University of California, Berkeley, 2005.

<sup>16</sup> Domestic laws, of course, say that espionage in all its forms are illegal; moreover, espionage by citizens is treason and even more repugnant. However, we are discussing international law and there is nothing in international law that addresses the objectives of spying.

## Regulation Cannot be Enforced

One of the key requirements to have a successful treaty (formalized regulation) is the ability to successfully enforce the treaty's requirements. There are two different types of enforcement. First, self-enforcement is possible only where implementation of treaty requirements is verifiable by a free press that is *trusted by the externally involved parties*. In many nondemocratic states, the press is either too weak to determine implementation or is controlled by the state; when this occurs, external parties cannot trust the press to accurately report on implementation. Thus, self-enforcement is mostly regulated to transparent democracies.<sup>17</sup> Second, external enforcement is also possible; examples of this type are the European Court of Justice, IAEA inspections and verification procedures in Cold War-era arms control treaties, such as those famously asserted by President Reagan's "trust, but verify."

The problem with formalizing the regulation of espionage is that since espionage affects the core interest of a state – state survival – effective enforcement is not possible. Enforcement of SALT I and subsequent Cold War arms control treaties, for example, was only made possible because both parties, the United States and the Soviet Union, saw no benefit to continue the palpably endless and futile arms race in the increased production of ICBMs and nuclear warheads. In contrast, IAEA inspections are weaker than the Cold War-era arms control inspections because of the problem of enforcement: to defy a diverse international community with different goals and objectives is one thing (see: differing global responses to North Korea and Iran 2007), but to defy painstaking negotiations with an opposing superpower in the atmosphere of the Cold War may have been suicidal.

Enforcement of a formalized regulation of espionage is also unlikely because of the "dog that didn't bark" problem. Because espionage is almost always necessarily covert, one party would not be able to tell if another party is cooperating simply because no spies have been caught. Indeed, espionage may still be going on, but the inability to expose espionage and the possible difficulty of proving espionage was committed cannot prove that espionage is not actually being committed.

Goldsmith and Posner argued that enforcement is unlikely because of the likelihood of noncompliance:

State leaders are always uncertain about the information, preferences, and motivations of other states. As a result, they worry about other nations' noncompliance with norms and agreements. The noncompliance consideration, which takes us from ideal to nonideal theory on the international stage, counsels

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<sup>17</sup> Many examples of self-enforcement can be found in the European Union, as the EU institutions and Member States attempting to determine if all Member States are actually implementing EU legislation and directives.

caution in embracing international regimes that involve national sacrifices *and* that depend for their efficacy on compliance by other states.<sup>18</sup>

A formalized regulation of espionage would of course involve *both* national sacrifices of the highest order (the security of the state) and dependency on the compliance of other, presumably hostile, states.

Downs, Rocke, and Barsoom posed the following question regarding enforcement: "...does [this] mean that states only make agreements that do not require much enforcement?... [If that] is the case, what are the implications for the future of regulatory cooperation?"<sup>19</sup> The answer is, at least for high-security state interests like espionage, that the implications for formalized regulation cooperation are not positive.

### Short Shadow of the Future

In the *Evolution of Cooperation*, Robert Axelrod attempts to explain how different parties can cooperate successfully. According to Axelrod, enlarging the shadow of the future is critical to ensuring successful and long-term cooperation:

Mutual cooperation can be stable if the future is sufficiently important relative to the present. This is because the players can each use an implicit threat of retaliation against the other's defection - if the interaction will last long enough to make the threat effective....as the shadow of the future becomes smaller, it stops paying to be cooperative with another player - even if the other player will reciprocate your cooperation....This conclusion emphasizes the importance of the first method of promoting cooperation: enlarging the shadow of the future. There are two basic ways of doing this: by making the interactions more durable, and by making them more frequent (i.e., specialize your business so it interacts with only a few other organizations, group employees working on related tasks together, in bargaining context - break the issues into small pieces to promote more frequent interactions).<sup>20</sup>

Formal regulation of espionage will *ensure* a dangerously short shadow of the future because states – almost all of whom currently practice espionage – have *no* incentive to believe that other states will suddenly, voluntarily, give up a critical component of their national security strategy. While Axelrod offers two different methods to enlarge the shadow of the future, neither will be helpful to expand the shadow of the future for the formalized regulation of espionage. Interactions (in this case, the absence of espionage) cannot be made more durable or more frequent because either a state *is* spying or it is *not*; there is no middle ground.

<sup>18</sup> Goldsmith, Jack and Posner, Eric. *The Limits of International Law*. Oxford University Press, 2005. Page 87

<sup>19</sup> Downs, Rocke, and Barsoom. "Is the Good News about Compliance Good News about Cooperation?" *International Organization*, Vol. 50, No. 3 (Summer, 1996). Page 383

<sup>20</sup> Axelrod, Robert. *The Evolution of Cooperation*. Basic Books, New York, NY, 1984. Pages 126,132

This short shadow of the future further guarantees that any formalized regulation of espionage will not be effective.

### Penalty for Unilateral Cooperation is High

In April 1976, Herbert Scoville, Jr., wrote that espionage<sup>21</sup> has a “limited but nevertheless critical potential as a source of intelligence information.”<sup>22</sup> He argued that “[o]pen published information and that obtained through diplomatic and other overt contacts is by far the most generally useful source of political and economic intelligence.”<sup>23</sup> While Scoville’s reasoning may or may not have been true in 1976 – especially when considering Scoville’s omission of SIGINT from his definition of espionage – this is certainly not true today and has rarely been true throughout recorded history of closed societies that represent the most obvious threat to modern Western states.<sup>24</sup> Today, espionage is used by nearly all states in order to determine political and military intentions as well as the location and inner workings of military hardware. States rarely publicly release such information, and if they do, the credibility of the published information is suspect.

In the years following the end of the Cold War, non-governmental institutions such as terrorist groups have increasingly become global threats and therefore the most likely targets of modern espionage. Since terrorist groups rarely release press releases – at least, *before* terrorist attacks when such releases would be of use – Scoville’s assertion that published information is more useful than HUMINT is, as a practical matter, *passé*, perhaps naïve and certainly outdated.

One piece of Scoville’s argument that is not outdated, however, is the following indisputable observation: “the knowledge of the attitudes of persons outside, as well as inside, the government is essential if we are to conduct a sound foreign policy.”<sup>25</sup> Foreign policy does not include only diplomacy, but continued state security and survival as well. Because espionage is so closely linked to the conduct of a sound

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<sup>21</sup> Scoville defined espionage differently than it is being discussed in this paper. Scoville defines espionage as only HUMINT. SIGINT is not “espionage” as defined by Scoville, who argued that SIGINT is “more valuable than espionage.” Scoville probably omitted SIGINT from espionage because in 1976 SIGINT was not as developed and advanced as it is today. Today, the standard definition of espionage includes both HUMINT *and* SIGINT, as it does in this paper. If he had written this article today rather than in 1976, Scoville would almost certainly have included SIGINT in his definition of espionage and by doing so, would probably not have said that espionage had “limited” potential.

<sup>22</sup> Scoville Jr., Herbert. “Is Espionage Necessary for Our Security?” *Foreign Affairs*, April 1976. Page 5

<sup>23</sup> *Ibid*, 5.

<sup>24</sup> Even though the benefits of open source information are limited, the WMD Commission in 2005 recommended that the United States’ intelligence community “devote more attention and resources to exploiting openly available information.” On November 8, 2005, Director of National Intelligence John Negroponte announced the creation of the Open Source Center to “exploit...openly available information...includ[ing] the Internet, databases, press, radio, television, video, geospatial data, photos and commercial imagery.”

[http://www.dni.gov/press\\_releases/20051108\\_release.htm](http://www.dni.gov/press_releases/20051108_release.htm)

<sup>25</sup> *Ibid*, 5.

foreign policy and continued state security and survival, states have very little incentive to formally regulate espionage.

If states were to somehow formally regulate espionage, the penalty for unilaterally cooperating while other parties defect could be very high: if a single state was to stop committing espionage, while all other states continued to commit espionage, the unilaterally cooperating state would be at a severe and obvious security disadvantage. Because the penalty for unilaterally cooperating while other parties defect is so high, formalized regulation of espionage is unlikely.

### **Different Effects of Formal Regulation on Strong and Weak States**

Like many areas of international cooperation, any formal regulation of espionage would necessarily affect stronger states differently than weaker states. Today, the absence of formal regulation of peacetime espionage benefits stronger states over weaker states. Because stronger states have more money and resources, their capabilities for espionage are much more expansive and widespread than weaker states. While weaker states may have the resources to spy on geographically-close neighbors, stronger states can cast a much wider net.

Additionally, because stronger states have more resources they are more likely to be able to verify the accuracy of information gained by espionage; weaker states may not have the resources needed to verify or properly take advantage of such information.

The formal regulation of espionage would reduce every state, strong and weak, to the same level. Strong states would lose their extremely important relative security advantage over weaker states. Because formal regulation would necessarily limit stronger states more than weaker states, there is no incentive for stronger states to voluntarily give up a vital security advantage.

### **The Reduction of Private Information and the Continuation of Stability**

The final and most important reason why states will not – and cannot – formally regulate peacetime espionage is that states recognize the problems posed by private security-relevant information. Non-revisionist states understand that the reduction of some private information leads to the continuation of stability. The formal regulation of espionage – the elimination of spying – would lead to ever-increasing amounts of private information. States, unable to verify the actual intentions of other states, could not trust other states. This would inevitably lead to fewer instances of international cooperation and states, without a means to verify the intentions of other states, would be locked into an increasingly dangerous spiral of distrust, miscalculations, overreaction, and, possibly, a security dilemma that may lead to actual confrontation.

History is riddled with cases in which the lack of private information dooms a state at war, such as Napoleon's and Hitler's invasions of Russia, the Falkland Islands conflict, the Vietnam War, and the 2003 Iraq War. All of these failures occurred because

the intentions and/or capacities of the prospective enemy were not known, incorrect, or ignored; the reduction of this private information in any of these cases could have significantly changed the behavior which, in hindsight, seems irrational.

Even democratic states are either subconsciously or unwilling to openly declare their interest in reducing private information. The Bush II Administration's fixation on "national security" to reduce private information is hardly new or inconsistent with the tenets of Realism.<sup>26</sup> States are, even in the best of circumstances, primarily concerned with the security of their state. States that are unwilling to go to war have less incentive to hide private information, especially private information about their intentions. Indeed, peace is more easily achievable by a state's openness and honesty about its peaceful intentions. By being transparent, states lessen the chance that another state will misinterpret its actually-innocuous conduct as the concealment of threatening intentions. On the other hand, revisionist states that are actively pursuing their threatening intentions have incentives to deceive and hide their private information.

States that do *not* want to go to war thus have incentives to be candid about their peaceful intentions. Indeed, this is seen throughout the Cold War. Neither the United States nor the Soviet Union, despite their radically different core philosophies and interim objectives and even localized brush fire surrogate wars, particularly *wanted* their relationship to devolve into war. However, because mistrust was so high and the omnipresent domestic influence of their respective hardliners, the superpowers (especially the Soviet Union) found it difficult to unambiguously convey their true peaceful intentions.<sup>27</sup>

In order to confirm their ultimately peaceful intentions, beginning in 1969 with SALT I, the United States and the Soviet Union agreed to "verification procedures" in their arms control agreements. Verification procedures are a form of intelligence gathering, but were codified in a bilateral and *sui generis* regulatory framework that was agreed to by the parties.<sup>28</sup> Indeed, throughout the Cold War, the United States understood that the reduction of private (classified or secret) information was paramount to continued stability and peace. The more-paranoiac Soviet Union came to this realization only decades after Stalin's death.

The best (non-classified) proof of an official American understanding that the reduction of private information was critical to continued peace came in a May 1960 U.S. Department of State press release as the U.S. government futilely attempted to shift blame for American spying of the Soviet Union and Francis Gary Powers' U-2 onto the Soviet government:

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<sup>26</sup> It is important to clarify that the Bush II Administration wants to reduce the private information of *other* states/groups. American private information is, of course, to remain private information.

<sup>27</sup> See: insistent American claims of a missile gap despite concrete proof to the contrary.

<sup>28</sup> Verification procedures differ from espionage in that verification procedures are voluntarily accepted by the parties; espionage is not.

For many years the United States in company with its allies has sought to lessen or even to eliminate this threat from the life of man so that he can go about his peaceful business without fear. Many proposals to this end have been put up to the Soviet Union. The President's "open skies" proposal of 1955 was followed in 1957 by the offer of an exchange of ground observers between agreed military installations in the U.S., the USSR and other nations that might wish to participate...More recently at the Geneva disarmament conference the United States has proposed far-reaching new measures of controlled disarmament. It is possible that the Soviet leaders have a different version and that, however unjustifiedly, they fear attack from the West. But this is hard to reconcile with their continual rejection of our repeated proposals for effective measures against surprise attack and for effective inspection of disarmament measures...This government had sincerely hoped and continues to hope that in the coming meeting of the Heads of Government in Paris Chairman Khrushchev would be prepared to cooperate in agreeing to effective measures which would remove this fear of sudden mass destruction from the minds of people everywhere. Far from being damaging to the forthcoming meeting in Paris, this [U-2] incident should serve to underline the importance to the world of an earnest attempt there to achieve agreed and effective safeguards against surprise attack and aggression.<sup>29</sup>

In 1955, President Eisenhower proposed "Open Skies," which called for an international aerial monitoring system that would prevent states from hiding stockpiles of nuclear weapons.<sup>30</sup> Eisenhower stressed the connection between the availability of information and the prospects for peace:

The quest for peace is the statesman's most exacting duty. Security of the nation entrusted to his care is his greatest responsibility. Practical progress to lasting peace is his fondest hope. Yet in pursuit of his hope he must not betray the trust placed in him as guardian of the people's security. A sound place-with security, justice, well-being, and freedom for the people of the world- can be achieved, but only by patiently and thoughtfully following a hard and sure and tested road.<sup>31</sup>

In 1957, Eisenhower also proposed exchanging ground observers between American and Soviet military installations. Eisenhower obviously understood that the reduction of private information was paramount to continued peace and stability. However, the Soviet Union, still infused with the paranoia of Stalin years after his death in March 1953,<sup>32</sup> was not agreeable to these proposals as they were still very

<sup>29</sup> <http://www.eisenhower.archives.gov/dl/U2Incident/DeptofStateforthePressMay91960No254pg1.pdf>  
<http://www.eisenhower.archives.gov/dl/U2Incident/DeptofStateforthePressMay91960No254pg2.pdf>

<sup>30</sup> It is important to note that the term "open skies" has two different historical meanings. It can either mean the international aerial monitoring system proposed by President Eisenhower or relate to the international commercial aviation conventions. In this paper, the term "open skies" refers to the former.

<sup>31</sup> July 21, 1955. Public Papers of the Presidents, Dwight D. Eisenhower, 1955, p. 713-716

<sup>32</sup> Khrushchev's early attempt of "de-Stalinization" was in hindsight a failure and had little impact on Soviet-American relations during the Cold War. His 1956 Secret Speech, while noteworthy, did little to erase Stalin's influence on the ingrained paranoid Soviet views on Western untrustworthiness. As time

suspicious of Western – capitalist – intentions. Realizing that the Soviet Union did not yet understand that private information was dangerous to continued peace and stability and therefore could not trust the West, Eisenhower had no choice but to order surveillance flights of the Soviet Union. Of course, his actions, however useful or well-intentioned, were ultimately used to provide further “proof” of Western duplicity and strengthened the hand of the hardliners who eventually ousted Khrushchev in 1964.

As the above press release illustrates, even in the fallout of the U-2 incident Eisenhower plaintively – perhaps naïvely – suggested that the U-2 incident embodied the very reason why private information should be reduced and should instead be a catalyst in achieving effective safeguards against aggression. It was not until 1969 and the successful negotiation of the SALT I treaty<sup>33</sup> that there is definite evidence that the Soviet Union saw the benefit in reducing private information.

### “Developing Trust – One Frame at a Time”

Besides the examples cited above, there are additional instances that prove that states recognize that the reduction of private information is conducive to continued stability.

In the middle of the night of April 26, 1986, reactor #4 at the Chernobyl Nuclear Power Plant in Chernobyl, Ukraine (then part of the USSR), suffered a catastrophic nuclear meltdown, resulting in a still-controversial number of cancers and immediate fatalities and the eventual abandonment of the affected area. As news of the meltdown – and radioactive material – slowly filtered beyond Soviet control and into the West, global interest in nuclear safety predictably and dramatically increased. Nearly overnight, the International Atomic Energy Agency (IAEA) became responsible for the safe use of nuclear energy worldwide. In addition to ensuring safeguards against the misuse of nuclear technology for non-peaceful purposes, the IAEA also provides safety measures intended to prevent nuclear accidents. In order to ensure the peaceful application and safe use of nuclear technology, signatories to the IAEA are subject to inspections of existing nuclear facilities in order to determine that the nuclear technology is being used solely for peaceful purposes and that the facilities follow internationally-set safety standards.

Before Chernobyl, the international community was focused on nuclear nonproliferation. After Chernobyl, the international community realized that by conflating nuclear technology with weapons-making ability and thus making all nuclear technology

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went on and the shadow of the future lengthened, the Soviet Union began to trust the United States which led to arms control treaties between the two superpowers. However, true de-Stalinization would only occur with the fall of the Soviet Union and only after years of concentrated efforts by Mikhail Gorbachev. [See: Remnick, David. *Lenin's Tomb: The Last Days Of The Soviet Empire*. New York: Random House, 1993] Indeed, remnants of Stalinism continue in Russia today, both in certain nationalist parties and, arguably, in the allegedly authoritarian Putin administration.

<sup>33</sup> While the Soviet Union and the United States signed other noteworthy treaties between the 1960 U-2 incident and SALT I in 1969, it was only in 1969 when the United States and the Soviet Union agreed to verification procedures, an important step in reducing private information and building trust.

private information, nuclear safety protocols had also become private information. While the proliferation of nuclear technology and materials was understood to be destabilizing, knowledge of the safe use of nuclear energy was now acknowledged to lead to stability and safety. After Chernobyl, the IAEA became, in reality as well as theory, the designated global authority on nuclear safety and developed into a vehicle for reducing private information.

In Reykjavik, Iceland in 1986, there was another attempt to reduce private information. During a American-Soviet summit, President Reagan attempted to persuade Premier Gorbachev that he sincerely wanted to reduce private information: Reagan asserted that the United States would share the results of American research into Strategic Defense Initiative (SDI) (dismissed as “Star Wars” by Reagan’s critics) with the Soviet Union, after the research was completed and implemented by both the United States and her Western allies. Gorbachev dismissed Reagan’s arguments as naïve and possibly dishonest, saying:

Excuse me, Mr. President, but I do not take your idea of sharing SDI seriously. You don't want to share even petroleum equipment, automatic machine tools or equipment for dairies,<sup>34</sup> while sharing SDI would be a second American Revolution. And revolutions do not occur all that often. Let's be realistic and pragmatic. That's more reliable.<sup>35</sup>

Today, historians still debate both the sincerity and viability of President Reagan’s offer to share SDI as well as the technological viability of SDI. However, whether or not Reagan would actually share SDI with the Soviet Union – or could even successfully complete such a program – is beyond the scope of this paper: what is important is that the President of the United States explicitly acknowledged the benefit of releasing private information (indeed, private information which, if obtained, would have been one of the most expensive ever obtained) and *did* offer to share this extremely classified private information with the Soviet Union, the opposing superpower. Whether Reagan was motivated more by domestic concerns or even to offer lip service to disbelieving Europeans is unimportant; the fact remains is that Reagan felt *compelled* to offer SDI and to acknowledge the relationship between openness and true stability and security.

At the Helsinki Conference on Security and Cooperation in Europe in 1975, the parties at the conference<sup>36</sup> agreed on the so-called Final Act of the Conference in order to reduce the risk of possible armed conflict that results from misunderstanding military actions (in other words, armed conflict that occurred because of private information).

<sup>34</sup> Premier Gorbachev referenced several types of advanced technology that the Reagan Administration refused to share even with its allies.

<sup>35</sup> <http://www.cnn.com/SPECIALS/cold.war/episodes/22/documents/reykjavik/>

<sup>36</sup> The signatories of the Final Act of the Conference are as follows: Austria, Belgium, Bulgaria, Canada, Cyprus, Czechoslovakia, Denmark, Finland, France, the German Democratic Republic, the Federal Republic of Germany, Greece, the Holy See, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, the USSR, the United Kingdom, the United States and Yugoslavia.  
<http://www1.umn.edu/humanrts/osce/basics/finact75.htm>

The Final Act dictates that “the participating States will invite other participating States, voluntarily and on a bilateral basis, in a spirit of reciprocity and goodwill towards all participating States, to send observers to attend military manoeuvres.”<sup>37</sup> While the Final Act is not technically a treaty and therefore is nonbinding, it does provide a framework for the exchange of military observers and does signify that states recognize the threat of private information; in this case, the misinterpretation of military actions.

Unlike the Final Act, the Open Skies Treaty *is* a treaty and therefore is binding. It is a continuation of President Eisenhower’s 1955 “open skies” proposal to the Soviet Union and was reintroduced by President George H.W. Bush in 1989 as a trust- and confidence-building institution between NATO and then-Warsaw Pact countries. The Treaty was signed in March 1992 by 24 countries but only came into effect in January 2002 after it was finally ratified by Russia and Belarus. There are currently 32 signatories to the Open Skies Treaty;<sup>38</sup> former Soviet Union states may accede to the Treaty at any time while non-former USSR states interested in accession are subject to approval by the Open Skies Consultative Commission. The Treaty explicitly states that the entire territory (including land, island, internal and territorial waters) of a member state is open for observation. Member states are limited by quotas to ensure that one party cannot conduct more observations than it is allowing of its own territory.<sup>39</sup> Finally, all imagery collected is available to any other member state, pending only the payment of the costs of reproduction.

Today, the Open Skies Treaty is the most expansive effort by states to promote openness and transparency in order to gain mutual trust by reducing private information. The Open Skies Treaty is an excellent “provid[er] of valuable information that [can] promote cooperation and coordination.”<sup>40</sup> With this goal in mind, the motto of the United State’s Open Skies Media Processing Facility is “Developing Trust – One Frame at a Time.”<sup>41</sup> The Open Skies Media Processing Facility operates under a military agency known as the Defense Threat Reduction Agency. Obviously, the threat posed by private information is recognized by these American governmental agencies.

## Wrap-Up

States can – and do – gain the benefits of reduced private information without formally regulating espionage. Formally regulating espionage necessarily adds tacit recognition of what is, by definition, an unrecognized act. Instead of formally regulating

<sup>37</sup> [http://www.osce.org/documents/mcs/1975/08/4044\\_en.pdf](http://www.osce.org/documents/mcs/1975/08/4044_en.pdf)

<sup>38</sup> The signatories of the Open Skies Treaty are as follows: Belarus, Belgium, Bosnia-Herzegovina, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Italy, Kyrgyzstan, Latvia, Lithuania, Norway, Poland, Portugal, Romania, Russia, Spain, Slovenia, Slovakia, Sweden, Turkey, Ukraine, the United Kingdom, and the United States. [http://www.osmpf.wpafb.af.mil/Treaty\\_info/Treaty.htm](http://www.osmpf.wpafb.af.mil/Treaty_info/Treaty.htm)

<sup>39</sup> “Quotas” in the Open Skies Treaty attempt to reconcile the fact that states want to be able to spy on everyone without anyone spying on them.

<sup>40</sup> Goldsmith, Jack and Posner, Eric. *The Limits of International Law*. Oxford University Press, 2005. Page 225

<sup>41</sup> <http://www.osmpf.wpafb.af.mil/US%20Certification%20Home%20Page.html>

espionage (which is the unapproved transfer of private information), states formally regulate the exchange of approved private information by voluntarily submitting to various methods of acceptable external investigation (IAEA inspections, Open Skies Treaty, etc.). In addition, customary laws like the Final Act provide frameworks to reduce private information and misunderstanding.<sup>42</sup>

The inability to enforce formalized regulation – combined with a high penalty for unilaterally cooperating – means that states have an incentive to cheat: “self-interest will prevent such cheating *only* if the consequences of cheating are greater than the benefits.”<sup>43</sup> Punishment for cheating is also ineffective because such punishment will not “hurt the transgressor state at least as much as that state could gain by the violation.”<sup>44</sup> Furthermore, “punishment still depends on state action and is subject to...related collective action problems;”<sup>45</sup> states do not attack or go to war with other states merely because espionage was committed.

Punishment for peacetime espionage involves either the temporary imprisonment of foreign national spies (in cases where the exposed espionage has been publicly announced) or longer imprisonment or the death penalty (in cases where exposed espionage is unannounced) in addition to the probable forfeiture of captured surveillance equipment.<sup>46</sup> For cases where exposed espionage is publicly announced, the spying state may suffer great embarrassment, such as the Soviet release of pictures of Francis Gary Powers alive and well, his CIA-provided gear, and his remarkably intact U-2 plane. Punishment for diplomatic espionage almost always means that the offending diplomat is declared *persona non grata*, hardly an effective means to dissuade parties from defecting from a formalized regulation of espionage. International embarrassment, either the imprisonment or death of the foreign national spy and the loss of surveillance equipment are the only punishments suffered by a state caught in the act of espionage. Since global image is fleeting and there will always be more spies to send, only the loss of sensitive spying equipment poses any real punishment to a spying state.

Non-revisionist states see a need for reducing mistrust and misinterpretation of their own benign intentions. Because the Soviet Union insisted on being secretive and refused his overtures towards mutual transparency, President Eisenhower felt he had no other choice than to vigorously pursue espionage.<sup>47</sup> President Reagan recognized the Soviet fear of SDI and attempted to assuage their concerns by his promises –

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<sup>42</sup> Kapp, Michael. “*Peacetime Espionage: How international law helps resolve the peacetime capture of spies*,” University of California, Berkeley, 2005.

<sup>43</sup> Downs, Rocke, and Barsoom. “Is the Good News about Compliance Good News about Cooperation?” *International Organization*, Vol. 50, No. 3 (Summer, 1996). Page 384 (emphasis mine)

<sup>44</sup> *Ibid*, 386

<sup>45</sup> Goldsmith, Jack and Posner, Eric. *The Limits of International Law*. Oxford University Press, 2005. Page 87

<sup>46</sup> Kapp, Michael. “*Peacetime Espionage: How international law helps resolve the peacetime capture of spies*,” University of California, Berkeley, 2005 Senior Thesis.

<sup>47</sup> Nonetheless, it is likely that Eisenhower would have done so even if the USSR had agreed to his proposal: not all private information, such as political intentions, can be deduced from the air.

although widely viewed with great skepticism – to reduce private information through the sharing of advanced technology. In order to reduce misinterpretations of military actions, the Final Act at Helsinki created a voluntary framework to exchange military observers. Recognizing that transparency breeds trust, the Open Skies Treaty codified foreign surveillance of national territory in an attempt to build trust between NATO countries and former Soviet satellites. Finally, all the above treaties/agreements were pushed by nominally hardliner Republican Presidents, including Eisenhower, Ford, Reagan, and Bush I, which means that even those who see the greatest external threat believe that reducing private information can be a vehicle that breeds trust and cooperation with the eventual goals of peace and stability.

States are better able to determine the interests and reasoning behind actions of other states by reducing private information. Recognizing the threat posed by private information, states try to reduce private information any way they can, including legal measures (treaties such as the Open Skies Treaty) or by illegal ones (espionage). Formal regulation of peacetime espionage would not only be contrary to states' interest in protecting their own secrets, it would also be an affirmatively dangerous impediment to the reduction of private information.

Because states are, after all, primarily concerned with their own security, every state wants to maximize its own ability to spy on other states while minimizing other states' abilities to spy upon it. In a state's ideal world, it would want unlimited access to information about other states while other states have no information about it. The formal regulation of peacetime espionage would necessarily impinge on the ability of states to access private information of other states. Therefore, states would have no interest in pursuing the formal regulation of an activity that would restrict their ability to protect themselves.

Because of all these inherent barriers to the successful formalized regulation of peacetime espionage, "states will rarely spend a great deal of time and effort negotiating agreements that will continually be violated"<sup>48</sup> nor will parties "accept or impose stringent regulations if the prospects for compliance are doubtful."<sup>49</sup> Furthermore, because states have an interest in continuing to commit peacetime espionage, they will not enter into a treaty that regulates it.<sup>50</sup>

## Contributions to Current Literature

### Rationalist Causes of War

Robert Powell, in "War as a Commitment Problem," argues that information asymmetry (also known as information problems) "arise when (1) the bargainers have private information about, for example, their payoffs to prevailing or about their military

<sup>48</sup> Downs, Rocke, and Barsoom. "Is the Good News about Compliance Good News about Cooperation?" *International Organization*, Vol. 50, No. 3 (Summer, 1996). Page 383

<sup>49</sup> Chayes and Chayes. "On Compliance." *International Organization*, 2001. Page 184

<sup>50</sup> *Ibid*, 179

capabilities, and (2) the bargainers have incentives to misrepresent their private information.”<sup>51</sup> During both peacetime and wartime, espionage is used to reduce these information asymmetry and information problems.<sup>52</sup>

The failure or success of espionage leads to either the lack of information or possession of information, respectively. Both the possession of information and the lack of information heavily influences the decisions of national leaders. Geoffrey Blainey, in *The Causes of War*, argues that “in deciding for war or peace national leaders appear to be strongly influenced by at least seven factors.”<sup>53</sup> These factors, according to Blainey, are as follows:

1. military strength and the ability to apply that strength efficiently in the likely theatre of war;
2. predictions of how outside nations will behave if war should occur;
3. perceptions of whether there is internal unity or discord in their land and in the land of the enemy;
4. knowledge or forgetfulness of the realities and sufferings of war;
5. nationalism and ideology;
6. the state of the economy and also its ability to sustain the kind of war envisaged;
7. the personality and experience of those who shared the decision<sup>54</sup>

All of Blainey’s factors are, at least in part, linked to the collection of information. The reduction of private, classified, or secret information assists states in objectifying the decision for war or peace. Plainly, by narrowing the opportunity for error/miscalculation, the reduction of *uncertainty* itself can reduce the chance of avoidable war or a cascade of factual or avoidable errors leading to war.<sup>55</sup>

Blainey argues that “wars usually begin when two nations disagree on their relative strength, and wars usually cease when the fighting nations agree on their relative strength.”<sup>56</sup> Blainey argues that war is a powerful cause of peace because it “increases the likelihood that nations will agree on their relative power”;<sup>57</sup> ironically, war is the simplest, most direct, and most universally-understood vehicle for determining relative strength. With war, the most important piece of private information is finally firmly established: the determination of relative strength.

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<sup>51</sup> Powell, Robert, "War as a Commitment Problem," *International Organization*, Vol. 60, No. 1 (2006). Page 170

<sup>52</sup> For a more detailed explanation on how actors deal with information asymmetries, see Goldsmith and Posner’s *The Limits of International Law*.

<sup>53</sup> Blainey, Geoffrey. *The Causes of War*, Third Edition, The Free Press, New York, 1988. Page 293

<sup>54</sup> *Ibid*, 293

<sup>55</sup> Additionally, the reduction of uncertainty can also increase the chances for cooperation during peacetime.

<sup>56</sup> Blainey, Geoffrey. *The Causes of War*, Third Edition, The Free Press, New York, 1988, Page 293

<sup>57</sup> *Ibid*, 294

Throughout this paper, I have argued that the reduction of private information can be a *vehicle* for peace, not that the correct interpretation of complete, reliable information is a necessary condition to prevent war. The reduction of private information is merely a single method – albeit a powerful one – that increases the *likelihood* of peace; therefore, some wars will occur despite complete and accurate information: for instance, a war over an object that cannot be divided, such as territory. Additionally, the reduction of private information (like determining relative strength) *during* a war may well be enough to force an early conclusion to the war. Only when warring states agree on their relative strength, Blainey would argue, is peace possible.

In “War as a Commitment Problem,” Powell is primarily concerned with refuting the theory that complete information will reduce the likelihood of war. Powell argues that, in the late 1930s, Great Britain and Nazi Germany would have gone to war even if both parties had complete information. Britain and Germany “would have fought each other even if there were no uncertainty. The maximum Britain was willing to concede (at least over the long run) was less than what was required to satisfy Hitler.”<sup>58</sup> In his discussion on asymmetric information and war, Powell concludes that “[f]ighting often does not seem to result from some residual uncertainty about an adversary. Rather, war comes when a state becomes convinced it is facing an adversary it would rather fight than accommodate.”<sup>59</sup>

## Democratic Peace Theory

In *Reliable Partners: How Democracies Have Made a Separate Peace*, Charles Lipson argues that “wars are, at bottom, caused by the problems of information and commitment, which block states from resolving serious differences. Constitutional democracies are simply better placed to solve these information and commitment problems.”<sup>60</sup> Transparency, Lipson argues, “makes both threats and promises more credible, lessening the chances that misperceptions will lead to war.”<sup>61</sup> Transparency, however, does not guarantee that the information will be interpreted correctly, as is seen in the incorrect Argentinean belief that the British would not go to war over the Falkland Islands. Transparency, while helpful, cannot overcome an inability or a blind unwillingness to accept reality; however, transparency can narrow the opportunities for miscalculation.

Democratic states, like any other type of state, are still primarily concerned with security. As such, information that is “open” in democracies may be seen as insufficient, or even a façade, by intractably hostile, dogmatic or paranoid states. After all, much important and/or crucial information is still private information in democracies. For example, much or all of the budgets of the CIA, MI6, and the Mossad is classified

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<sup>58</sup> Powell, Robert, “War as a Commitment Problem,” *International Organization*, Vol. 60, No. 1 (2006). Page 175

<sup>59</sup> *Ibid*, 194

<sup>60</sup> Lipson, Charles. *Reliable Partners: How Democracies Have Made a Separate Peace*. Princeton University Press, 2005. Page 53

<sup>61</sup> *Ibid*, 54

information.<sup>62</sup> Lipson's argument can also be countered with Goldsmith and Posner's theory that

states with poor institutions violate treaties, thereby revealing that they have poor institutions, with the result that other states will be reluctant to cooperate with them in the future. States with good institutions comply with treaties even when it is against their immediate interest, because by complying with treaties against this interest they avoid the inference that they are unreliable and instead reveal the quality of their institutions and attract future cooperative partners.<sup>63</sup>

Instead of saying that it is *democracy* that solves information and commitment problems, Goldsmith and Posner argue that a state with good (or *strong*) institutions, regardless of democratic factors, is a better cooperative partner than a state with poor (or *weak*) institutions. This point is demonstrable in economic relations between first world and third world democracies regarding third world debt.

A corollary of democratic peace theory is that the more a government's decisions are open to scrutiny the less likely that state will have warlike or belligerent intentions. Conversely, the more secretive and deceptive a government is about their intentions, the more likely that state has aggressive tendencies. This seems to be intrinsically and historically true. A comparison between the near-obsession of transparency in EU Member States and secretive and/or misleading intentions in Saddam Hussein's Iraq would be classic examples of this observation.

However, Sebastian Rosato's 2003 article "The Flawed Logic of Democratic Peace Theory," refutes this corollary of democratic peace theory, arguing that "transparency may contribute little to peace because a lot of information is not always good information...because [transparency] does not mean that their opponents will focus on the appropriate information or that the information will be interpreted

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<sup>62</sup> The division between open and private information is detailed in a January 1941 TIME Magazine article: "Last week, while the House Naval Affairs Committee approved a \$300,000,000 appropriation to modernize the Navy's out-of-date anti-aircraft defense (TIME, Oct. 14), its square-rigged chairman, Georgia's Carl Vinson, had a Navy secret in his pocket—an official tabulation, prepared by the Navy's Bureau of Ships, of vessels under construction, showing types, numbers and the location of yards where they are being built. Chairman Vinson spilled the secret after telling the Bureau of Ships that he intended to do so. One morning Rear Admiral Walter Stratton Anderson, director of Naval Intelligence, woke up to find the Navy's precious table printed in an extension of Vinson's remarks in the Congressional Record (whence it was speedily extracted by the press). Put down in one place for all to see, the Navy's summary was probably more complete than any that a foreign agent could compile from the most careful collection of individual contract announcements." In 1941, the Congressional Record could be subscribed to for only \$1.50 a month, therefore having the unintended benefit of allowing cheap access to some of the Navy's top secrets. This situation was rectified in the National Security Act of 1947 (which also gave birth to the CIA and National Security Council) which established that these new organizations are "authorized to be appropriated such sums as may be necessary and appropriate to carry out the provisions and purposes of this Act." (*National Security Act, 1947*. Title III, SEC. 307. [50 U.S.C. 411]) Today, classified appropriations are known as "black budgets" and are discussed in great detail in Tim Weiner's book *Blank Check: The Pentagon's Black Budget*.

<sup>63</sup> Goldsmith, Jack and Posner, Eric. *The Limits of International Law*. Oxford University Press, 2005. Page 101.

correctly.”<sup>64</sup> Furthermore, opposing states may become confused by disparate “signals not only from the democracy’s appointed negotiators but also from opposition parties, interest groups, public opinion, and the media,”<sup>65</sup> all of which are much weaker in non-democratic states. Rosato also argues that while “open political systems do indeed provide a great deal of information...sheer volume either has confused those who observe it or has merely served to reinforce their prior misperceptions.”<sup>66</sup> Rosato does allow for the possibility that if the information is perfect, and, presumably, interpreted correctly, it may help states avoid war.<sup>67</sup>

## Conclusion

States do not formally regulate peacetime espionage for five main reasons: enforcement is impossible, there is a short shadow of the future, the penalty for cooperation is high, stronger states would lose a critical part of their relative security advantage over weaker states, and states’ general acceptance of the benefits of reducing private information. These reasons may be further simplified: formal regulation of peacetime espionage would not only be ineffective in reducing espionage, it would likely be dangerous to global stability and the prospects of peace for all states.

Despite the sporadic and sometimes spectacular supposed public crises generated by exposed cases of peacetime espionage, peacetime espionage is generally recognized to be a *vital* instrument in both decreasing private information and ensuring state security and regional/global stability. In fact, it is generally understood that decreasing private information is *essential* to ensure the continuation of peace. While “information and power asymmetries...make international collective action problems difficult to overcome,”<sup>68</sup> the reduction of private information breeds greater cooperation and trust; this intuitive understanding is in part demonstrated by the widespread and non-controversial acceptance of the Open Skies Treaty. Because states know that decreasing private information is essential to stability, states that want stability will embrace – or at least acquiesce to – some espionage conducted against them; of course, no state will ever publicly say so or admit that “a little bit” of spying on their nation is necessary for the greater good of avoiding conflict or war.

While publicly expressing outrage, targeted states that genuinely want peace and stability may, at their highest policy level, privately tolerate patently hostile spying as a part of the price for peace and stability. In democratic societies, this is implicit in varying degrees of transparency: there is hardly a reason for a potential spying state to use espionage to determine bottom-line and generally reliable information that is published

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<sup>64</sup> Rosato, Sebastian. “The Flawed Logic of Democratic Peace Theory,” *American Political Science Review*, Vol. 97, No. 4 November 2003. Page 598

<sup>65</sup> *Ibid*, 598

<sup>66</sup> Rosato, Sebastian. “The Flawed Logic of Democratic Peace Theory,” *American Political Science Review*, Vol. 97, No. 4 November 2003. Page 599

<sup>67</sup> *Ibid*, 598

<sup>68</sup> Goldsmith, Jack and Posner, Eric. *The Limits of International Law*. Oxford University Press, 2005. Page 217

by a transparent target state on a website.<sup>69</sup> This is demonstrated in the historically relatively weak response to diplomatic espionage (expulsion), and the acceptance of atomic energy inspections and the Open Skies Treaty, which allows other states to verify the publicly-acknowledged location of military bases and hardware. However, there are limits to how tolerant a state could be. Even the most transparent states would not tolerate other states having knowledge of the blueprints for military hardware, the identity of at-risk operatives, or very specific contingency or operational plans; this is demonstrated in the relatively strong American response to the espionage conducted by Jonathan Pollard, Aldrich Ames, and Robert Hanson.

While a rival's objectively valid knowledge of the location of some military hardware and technology is acceptable, the understanding of how the hardware works is not. While a state may be perfectly willing to accept a potential opponent's knowledge of the location, or perhaps even the approximate capacity, of its missile sites, knowledge of the means of replication would not be acceptable. States that want peace have incentive to allow potentially hostile states to determine and confirm their real and honest intentions for peace, but there is no incentive to allow potentially hostile states to access the blueprints for military hardware or detailed operational information or plans.

Revisionist states that do not want peace or stability – or are even extremely untrustworthy or even paranoid of the intentions of other states – will have incentives to disallow other states from learning their classified information. This is demonstrated in the relatively-closed societies of the Soviet Union in 1960, the People's Republic of China in 2003, and Iran and North Korea in 2007, as well as the relatively-open democracy of Israel. Today, Israel, in a unique response to its peculiar security situation for a democracy, has a policy of deliberate ambiguity regarding its nuclear program. While Israel clearly<sup>70</sup> has nuclear weapons, it cannot admit it due to the obvious balance

<sup>69</sup> The following website, for example, details the precise numbers of active duty Navy personnel, the number of reserves available and the number of reserves already called up, the numbers of boats and submarines deployed, as well as the names and locations of carriers and strike groups:

[http://www.navy.mil/navydata/navy\\_legacy\\_hr.asp?id=146](http://www.navy.mil/navydata/navy_legacy_hr.asp?id=146)

This is in contrast to the well-known Soviet-era practice of removing Soviet cities that produced nuclear weapons from maps, or North Korea's classifying even the most benign things – even telephone books or the most innocuous statistics – as national secrets.

<sup>70</sup> Israel is also, perhaps, a unique case which, as a proudly law-abiding state, cannot acknowledge the widely-assumed fact that it is a nuclear power in blatant, although possibly necessary, disregard for international norms; at the same time, its interests are clearly served by allowing its enemies – and everyone else – believe that it is; hence, it has evolved a policy of deliberate ambiguity. In October 1986, a former Israeli nuclear technician named Mordechai Vanunu revealed to the British press the existence of Israeli nuclear weapons. He was later abducted in Italy by Mossad agents, returned to Israel, tried in secret – presumably to protect the fiction and ambiguity of its nuclear status, and, quite possibly, the details of its non-existent nuclear capacity – and convicted of treason. He spent 18 years in prison (11 of those in solitary confinement) until 2004 when he was released (but still subject to many lifestyle and speech restrictions). Such precautions would hardly be necessary if Israel did not have something to hide. Additionally, in December 2006, Israeli Prime Minister Ehud Olmert accidentally said “Iran openly, explicitly, and publicly threatens to whip Israel off the map. Can you say that this is the same level when they are aspiring to nuclear weapons, as America, France, Israel, Russia?” The following day this statement was “clarified”, claiming instead that Olmert was referring to the fact that the United States, France, Israel and Russia were democracies and that Iran was not.

of power issues it will raise in the already volatile Middle East; Israel's unconfirmed nuclear arsenal is one explanation offered by senior Iranian officials for that country's developing nuclear program. However, Israel's not-very-well-kept nuclear secret is not because Israel does not want peace or security, but simply because Israel is extremely untrustworthy of her neighbors who, of course, have invaded Israel multiple times since 1948 and continue to be hostile to Israel's continued existence. In all of the above cases, political and military intentions were and are shrouded in secrecy, ensuring the continuation of private information and its accompanying instability and uncertainty.

States that covet peace must recognize that in order to build a relationship of trust and cooperation with states that are untrustworthy of their intentions, the shadow of the future must be lengthened by (1) increasing the number of diplomatic, political, and economic contacts between the two states and therefore attempting to increase the shadow of the future per Axelrod's suggestions,<sup>71</sup> and (2) confirming their sincerity, honesty and peaceful intentions to untrusting hostile states by allowing some unfiltered – accurate – information that proves their non-violent intentions. The common way to collect accurate information on actual political and military intentions is, of course, espionage. Once untrusting states realize that other states hold non-aggressive and peaceful intentions towards them, a relationship of trust and cooperation – or, at least, a *modus vivendi* – may be forged.

However, if a spying state is caught committing espionage by a target state, the exposure will increase distrust and suspicion. Furthermore, successful espionage may not breed trust if the acquired private information gives the spying state reason to distrust a target state, e.g., the discovery of orders to position tanks on a shared border. However, if (1) the target states' intentions are benign, (2) the espionage is not discovered by the target state, and (3) the acquired information is interpreted correctly, the spying state will have reason to trust the intentions of target state.

Legal international activities (such as the Open Skies Treaty) and illegal international activities (such as the practice of peacetime espionage) enable states to keep an open mind about other states and may foster future cooperation by allowing states to reduce private information and correct misconceptions and misunderstandings. However, because the formal regulation of peacetime espionage would remove this critical instrument that states use to reduce private information, any formal regulation of peacetime espionage is unlikely, unwise, and would be inherently destabilizing to the current international system. Despite the unsavory reputation of spying, if it remains covert it may be extremely beneficial to stability and therefore may reduce the likelihood of avoidable war.

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<http://www.globalsecurity.org/wmd/library/news/israel/israel-061212-rferl01.htm>

<sup>71</sup> See the "Short Shadow of the Future" subsection

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