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# Intelligence Cooperation in International Operations: Peacekeeping, Weapons Inspections, and the Apprehension and Prosecution of War Criminals

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# Intelligence Cooperation in International Operations: Peacekeeping, Weapons Inspections, and the Apprehension and Prosecution of War Criminals

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*Simon Chesterman\**

## Introduction

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The subject of intelligence attracts attention out of proportion to its real importance. My theory is that this is because secrets are like sex. Most of us think that others get more than we do. Some of us cannot have enough of either. Both encourage fantasy. Both send the press into a feeding frenzy. All this distorts sensible discussion.

Sir Rodric Braithwaite, former Chairman of the  
British Joint Intelligence Committee, 2003<sup>1</sup>

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\* Global Professor and Director of the New York University School of Law Singapore Programme; Associate Professor at the National University of Singapore Faculty of Law. This draft paper draws on some material first published as Simon Chesterman, *Shared Secrets: Intelligence and Collective Security* (Sydney: Lowy Institute for International Policy, 2006) and Simon Chesterman, "The Spy Who Came In from the Cold War: Intelligence and International Law", *Michigan Journal of International Law*, vol. 27 (2006).

*PRELIMINARY DRAFT*

The sharing of intelligence through international organizations — on display most prominently in the lead-up to the Iraq war — has a long but murky history. Ever since the United Nations deployed peacekeepers into conflict zones it has been necessary to have a deep understanding of the theatre of operations and parties to a conflict, yet intelligence was long regarded as a “dirty word” as the 1984 *Peacekeeper’s Handbook* put it; “military information” was the preferred euphemism.<sup>2</sup> The “Capstone Doctrine” adopted for UN Peacekeeping in January 2008 at times appears to have been subjected to a kind of search-and-replace, referring variously to “information gathering”, “information sharing”, “information management protocols”, “operational information”, and “analysis of all-sources of information” but scrupulously avoiding the word “intelligence”.<sup>3</sup>

The prospect of the United Nations or any other international organisation developing an independent intelligence collection capacity is remote. This is due to the understandable wariness on the part of states about authorising a body to spy on them, though the United Nations itself has been reluctant to assume functions that might undermine its actual or perceived impartiality. At the same time, however, this position reflects a larger anomaly in the status of intelligence under international law as an activity commonly denounced but almost universally practised: empowering an international organisation to engage in espionage might give the lie to this example of diplomatic doublethink.<sup>4</sup>

Where intelligence activity of any kind is authorised, it tends to be within narrowly defined parameters. On occasion, this has led to absurd results. From August 1988, for example, the United Nations had an observer group in place to monitor the suspension of hostilities between Iran and Iraq. Beginning in July 1990 these observers

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<sup>1</sup> Sir Rodric Braithwaite, "Defending British Spies: The Uses and Abuses of Intelligence" (The Royal Institute of International Affairs, Chatham House, London, 5 December 2003).

<sup>2</sup> International Peace Academy, *Peacekeeper's Handbook* (New York: Pergamon Press, 1984), pp. 39, 59-62, 120-121. See also Carl von Horn, *Soldiering for Peace*, 1st American ed. (New York: David McKay, 1967), p. 222.

<sup>3</sup> UN Department of Peacekeeping Operations and Department of Field Support, UN Peacekeeping Operations: Principles and Guidelines (Capstone Doctrine)18 January 2008), available at <[http://www.un.org/peace/reports/peace\\_operations](http://www.un.org/peace/reports/peace_operations)>, 17, 65, 70, 71.

<sup>4</sup> See Chesterman, "Intelligence and International Law".

*PRELIMINARY DRAFT*

had noted the movement of large numbers of Iraqi units to the south, in the direction of the border with Kuwait. As the troops had not moved east, towards Iran, the observers were prevented from making an official report — and appear not even to have issued an informal report prior to Iraq’s invasion of Kuwait the following month.<sup>5</sup>

More recently, efforts to address the threats posed by terrorism and weapons of mass destruction have led to a reconsideration of how intelligence can and should be used in bodies such as the United Nations. Understanding the threat posed and calibrating a response depends on access to national intelligence; if that response is to be multilateral, the legitimacy of any action taken may depend on sharing that intelligence. In the case of terrorist financing, this has led to legal challenges to the bases on which individuals’ assets are frozen,<sup>6</sup> a topic addressed in this volume by Iain Cameron.<sup>7</sup> Weapons inspections in Iraq through the 1990s and elsewhere have quietly drawn upon the assistance of “friendly” intelligence agencies, though the spectacular failure in Iraq severely undermined the credibility of this assistance. In a separate development, moves to pursue international criminal prosecutions through the 1990s in the Balkans and, to a lesser extent, Rwanda, required information that — in the absence of a meaningful investigative capacity — came from the intelligence services of governments.

This chapter will examine the use of intelligence in three areas — peacekeeping, weapons inspection, and international criminal prosecution — with a view to considering the accountability challenges posed by such cooperation.

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<sup>5</sup> Cees Wiebes, *Intelligence and the war in Bosnia, 1992-1995* (Münster: LIT Verlag, 2003), pp. 25-26.

<sup>6</sup> See, eg, *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities (Cases C-402/05 P and C-415/05)* (European Court of Justice, 3 September 2008), available at <<http://curia.eu.int>>.

<sup>7</sup> See the chapter by Iain Cameron in the present volume.

## I. Peacekeeping

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Intelligence functions in peacekeeping have been driven by the exigencies of the situation, notably focusing on force protection and effective implementation of the mandate. The key check on such activities has been the extent to which the mandate authorizes a departure from the default respect for sovereignty. Toleration of intelligence activities in practice has not been matched by acceptance in theory, however, with the result that such activities are often inefficient, inconsistent, or ineffective. The predisposition in the United Nations against intelligence originally extended even to avoiding encrypted transmissions. Though this is no longer official policy, it may still lead to perverse results. At one point in the Bosnian conflict, Scandinavian soldiers in the UN Protection Force (UNPROFOR) were monitoring the impact of mortar fire from Serb units outside a besieged Muslim town and duly reporting to UN force headquarters the location of the hits. Unknown to them, the Serb forces were listening to UN radio communications and using this information to improve the accuracy of their strikes.<sup>8</sup>

### A. Early Years

In the early years of the United Nations there appears to have been little consideration at all of intelligence as such. Swift paralysis by the Cold War and limited operational activities meant that intelligence was for the most part confined to espionage by and against the various governments represented in the UN organs, and against the host nation in particular.<sup>9</sup> The Korean War (1950-1953), though fought under UN auspices, was a United States affair, while the Suez crisis of 1956 indicated precisely the poverty of independent UN analysis — though this was by design of the French and British, who deceived the United States also. Secretary-General Dag Hammarskjöld actively rejected proposals to establish a permanent UN intelligence agency in 1960, in part because of his

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<sup>8</sup> A. Walter Dorn, "The Cloak and the Blue Beret: Limitations on Intelligence in UN Peacekeeping", *International Journal of Intelligence and Counterintelligence*, vol. 12, no. 4 (1999), p. 416.

<sup>9</sup> Stephen Schlesinger, *Act of Creation: The Founding of the United Nations* (Boulder, CO: Westview, 2003), pp. 93-94.

*PRELIMINARY DRAFT*

conviction that the United Nations must have “clean hands”.<sup>10</sup> It was only when the United Nations undertook its first major field operation in the Congo that questions of intelligence had to be confronted directly.<sup>11</sup> Intelligence was only a small part of the debate over the Congo operation, a conflict that split the Security Council, almost bankrupted the United Nations, and ensured that force was not used on a comparable scale for decades.<sup>12</sup> For the next quarter of a century, peacekeeping was limited to small observation or goodwill missions, most of them monitoring post-conflict situations.

*B. The Politics of Intelligence in the United Nations (1978-1999)*

“Military information” thus continued to feature in subsequent peacekeeping operations, but there was little serious discussion of any form of UN intelligence capacity for the remainder of the Cold War. In 1978 the French government proposed the creation of an International Satellite Monitoring Agency that could monitor disarmament agreements and international crises.<sup>13</sup> A group of experts appointed by the Secretary-General reported on the feasibility of such a body in 1981, envisaging an agency that might eventually operate independently, with its own satellites and receiving stations, but that would begin with facilities for processing and interpreting data acquired from other sources.<sup>14</sup> A General Assembly resolution was passed and the Secretary-General produced his own report. Without support from either the United States or the Soviet Union, however, the

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<sup>10</sup> Connor Cruise O'Brien, *To Katanga and Back* (New York: Simon & Schuster, 1962), p. 76; Brian Urquhart, *Hammarskjöld* (New York: Knopf, 1972), pp. 159-160.

<sup>11</sup> See Chesterman, *Shared Secrets*, pp. 10-11.

<sup>12</sup> Trevor Findlay, *The Use of Force in UN Peace Operations*, SIPRI (Oxford: SIPRI & Oxford University Press, 2002), pp. 51-86.

<sup>13</sup> Memorandum submitted on 24 February 1978 to the Preparatory Committee for the Special Session of the General Assembly Devoted to Disarmament; Address by His Excellency Mr. Valery Giscard d'Estaing, President of the French Republic, UN Doc A/S-10/PV.3 (25 May 1978); GA Res S-10/2 (1978), para 125(d).

<sup>14</sup> Report of the Secretary-General: The Implications of Establishing an International Satellite Monitoring Agency, UN Doc A/AC.206/14 (6 August 1981).

*PRELIMINARY DRAFT*

project was doomed.<sup>15</sup> Writing in 1985, former director of the CIA Stansfield Turner said that his own opposition to the agency while in office had been a mistake: the paramount concern of protecting US technical collection capacities had overwhelmed the potential benefits of such an agency to prevent wars ignited by misunderstanding or miscalculation, and to aid developing countries in more effective use of resources.<sup>16</sup> Such concerns also proved short-sighted — even more sophisticated imagery was commercially available from around 1986.<sup>17</sup>

In 1987 Secretary-General Javier Pérez de Cuéllar established an 18-member Office for Research and the Collection of Information (ORCI). Though the United States, together with Britain and France, had pushed for the creation of the office to save money and remove the preparation of a daily press-summary from the Political Information News Service, which was seen as a Soviet redoubt, nine conservative US senators opposed the creation of ORCI on the basis that the new office itself might provide a cover for Soviet spying in the United States. Undeterred by the fact that the office was run by Sierra Leonean James Jonah and essentially limited to summarising newspaper reports and other openly available material, a bill to block US funds for the office was introduced.<sup>18</sup> Cooler heads prevailed, but the tactic of legislating to limit the capacity of the United Nations to use intelligence returned during a period of genuine activism in the 1990s.<sup>19</sup>

This activism, beginning with the expulsion of Iraq from Kuwait and ending with the failure to intervene in Rwanda 1994, commenced with the disbanding of ORCI as a

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<sup>15</sup> GA Res 37/78K (1982); Report of the Secretary-General on the Proposal for the Establishment of an International Satellite Monitoring Agency, UN Doc A/38/404 (5 October 1983).

<sup>16</sup> Admiral Stansfield Turner, *Secrecy and Democracy: The CIA in Transition* (Boston: Houghton Mifflin, 1985), pp. 280-282.

<sup>17</sup> Michael R. Hoversten, "US National Security and Government Regulation of Commercial Remote Sensing from Outer Space", *Air Force Law Review*, vol. 50 (2001).

<sup>18</sup> "Nine Senators Try to Block Funds for UN Office Asked by US", *New York Times*, 16 April 1987; Lewis H. Diuguid, "Soviets Are Changing Their Obstructionist Ways at UN", *Washington Post*, 24 July 1988; "A UN Office Looks to Prevent Wars", *New York Times*, 16 April 1989.

<sup>19</sup> See John P. Renninger, "Early Warning: What Role for the United Nations?" in John P. Renninger (ed.), *The Future Role of the United Nations in an Interdependent World* (Dordrecht: Martinus Nijhoff, 1989).

*PRELIMINARY DRAFT*

separate body in 1992. (A second period of activism, which saw the number of peacekeepers grow from a low of 12,000 in mid-1999 to almost 110,000 deployed in September 2008, began with a failed attempt to establish a new information and strategic analysis secretariat as part of a package of reform proposals tabled in 2000.<sup>20</sup>) Even in the most active periods of the United Nations, then, profound ambivalence about its having either a collection or analytical capacity manifested in a rejection of the former and fragmentation of the latter. Halting progress was made on systemic analytical capacities during the consolidation of the Department of Political Affairs in 1992, but real change in how the United Nations handled intelligence was seen only, once again, in the conduct of its peacekeeping operations.<sup>21</sup>

In the period 1990 to 1993 the United Nations doubled the number of peacekeeping missions and increased the number of troops deployed in the field by a factor of five. The complexity of these operations also increased, with the United Nations taking on ambiguous responsibilities in the former Yugoslavia and Somalia far removed from the traditional peacekeeping role of monitoring a ceasefire between standing armies. With size and difficulty came risk: more peacekeepers were killed in 1993 than in the entire preceding decade.

In April of the same year, a Situation Centre was created in the Department of Peacekeeping Operations to provide a continuous link between senior staff members at UN Headquarters, field missions, humanitarian organisations, and member states through their diplomatic missions in New York. In addition to monitoring specific operations, it drew upon reports and open source information to provide daily situation reports on all peacekeeping and some political and humanitarian missions. An Information and Research Unit was added in September 1993, beginning with a single intelligence officer seconded from the United States and soon joined by representatives of Britain, France,

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<sup>20</sup> See the discussion of the Brahimi Report below at nn 36-39.

<sup>21</sup> Brief consideration of creating an intelligence capacity focused on early warning, encouraged by the European Community, Russia, the Scandinavian countries, Australia, Canada, and New Zealand was quickly killed: Leonard Doyle, "Washington Opposes Spy Role for UN", *Independent* (London), 20 April 1992; Mark Curtis, *The Great Deception: Anglo-American Power and World Order* (London: Pluto Press, 1998), pp. 200-201.

*PRELIMINARY DRAFT*

and Russia, typically drawn from the intelligence branches of their respective militaries.<sup>22</sup> The United States is later said to have provided a Joint Deployable Intelligence Support System (JDISS), a computer-system that linked the Situation Centre with databases operated by countries using the same system; essentially the United States and one or two other NATO countries.<sup>23</sup> The system was designed to avoid interoperability problems encountered during Operation Desert Storm, which drove Iraq from Kuwait in 1991. Its use at the United Nations was originally proposed to support US participation in operations in Somalia from 1993 — the troubled operation that began the US withdrawal from UN peace operations.<sup>24</sup>

This level of cooperation took place in a period of atypical enthusiasm for the United Nations at senior levels of the US government. President George H.W. Bush, who in 1990 heralded a “new world order”, included within this vision a United Nations that was able to back up its words with action.<sup>25</sup> The Clinton Administration inherited this policy and initially proposed to develop a Presidential Decision Directive (PDD) on multilateral peacekeeping operations that would have included a forward-leaning US policy on participation in peacekeeping, including provision of intelligence.<sup>26</sup> The death of 18 US soldiers in Somalia in October 1993 saw any such enthusiasm evaporate; what became PDD 25 was released at the height of the genocide in Rwanda and widely interpreted as a manifesto for inaction.<sup>27</sup>

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<sup>22</sup> Robert E. Rehbein, *Informing the Blue Helmets: The United States, UN Peacekeeping Operations, and the Role of Intelligence* (Centre for International Relations, Queen's University, Kingston, ON, 1996), available at <<http://www.queensu.ca/cir/pdf/Martello16.pdf>>, 30.

<sup>23</sup> Hugh Smith, "Intelligence and UN Peacekeeping", *Survival*, vol. 36, no. 3 (1994), p. 184; Rehbein, *Informing the Blue Helmets*, 30-32.

<sup>24</sup> See Mats R. Berdal, "Fateful Encounter: The United States and UN Peacekeeping", *Survival*, vol. 36, no. 1 (1994), p. 46; David Ramsbotham, "Analysis and Assessment for Peacekeeping Operations", *Intelligence and National Security*, vol. 10, no. 4 (1995).

<sup>25</sup> George H.W. Bush, "Address Before a Joint Session of the Congress on the Persian Gulf Crisis and the Federal Budget Deficit" (Washington, DC, 11 September 1990), available at <[http://millercenter.virginia.edu/scripps/diglibrary/prezspeeches/ghbush/ghb\\_1990\\_0911.html](http://millercenter.virginia.edu/scripps/diglibrary/prezspeeches/ghbush/ghb_1990_0911.html)>.

<sup>26</sup> This was the subject of a classified Presidential Review Directive 13, as reported in Jeffrey R. Smith and Julia Preston, "United States Plans Wider Role in UN Peace Keeping", *Washington Post*, 18 June 1993.

<sup>27</sup> See, eg, "Trotting to the Rescue", *Economist* (London), 25 June 1994.

*PRELIMINARY DRAFT*

The Somalia debacle and suspicions that it might have been connected to intelligence leaks from the UN mission had led to a minor rebellion in Congress, with legislation proposed in November 1993 and January 1994 that would have substantially curtailed intelligence sharing with the United Nations.<sup>28</sup> The discovery of large quantities of classified US documents and imagery in open cabinets at a deserted UN office in Mogadishu was greeted with apoplexy: a series of amendments and entire bills were proposed that would have made sharing US intelligence with the United Nations virtually impossible.<sup>29</sup>

What is interesting about these legislative manoeuvres is that none of them was pursued with particular vigour. In part this was due to the threat of a presidential veto, but other reasons were illustrated in hearings by a House intelligence committee concerning a provision that would have required the President and the Secretary-General to conclude a written agreement before any US intelligence could be provided to the United Nations.<sup>30</sup> Unclassified testimony sketched out the regime in place for selective transfer of intelligence to the United Nations, typically through representatives of the Joint Staff (J2), one of whom would be based in the US Mission to the United Nations, with a second based in the UN Situation Centre. At the same time, a UN Support Desk in the National Military Joint Intelligence Center (NMJIC) provided the UN with sanitised intelligence on a daily and ad hoc basis. The regime enabled the United States to use intelligence selectively in support of its foreign policy as and when it was helpful to do so, without requiring the provision of other intelligence or the revelation of sources and methods.<sup>31</sup>

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<sup>28</sup> International Peacekeeping Policy Act of 1993, introduced on 10 November 1993 and referred to the House Subcommittee on International Operations: 103rd Congress, 1st Session, HR 3503; Peace Powers Act of 1994, introduced on 26 January 1994 and referred to the House Subcommittee on International Operations: 103rd Congress, 2nd Session, HR 3744.

<sup>29</sup> R. Jeffrey Smith and Julia Preston, "US Probes Security for Somalia Files; Secret Documents Left Unprotected by UN", *Washington Post*, 12 March 1995.

<sup>30</sup> National Security Revitalization Act of 1995, introduced on 5 January 1995, HR 7 (IH), § 512.

<sup>31</sup> Permanent Select Committee on Intelligence, Intelligence Support to the United Nations (Open Session) (United States Congress, House of Representatives, One Hundred Fourth Congress, first session, CIS 96 H431-1, Washington, DC, 19 January 1995), 12 (statement by Toby T. Gati, Assistant Secretary of State for Intelligence and Research).

*PRELIMINARY DRAFT*

Selectivity in shared intelligence is a recurring problem, with numerous UN staff suspecting — accurately — that intelligence is provided to them in support of national policy and frequently in order to manipulate the United Nations. A former military adviser to the Secretary-General cites the crisis in Eastern Zaïre as an example: one permanent member in favour of intervention provided intelligence showing large numbers of displaced persons in wretched conditions; a second permanent member opposing intervention offered intelligence suggesting a far smaller number of people subsisting in more reasonable conditions. It was, he concluded, a “shameful exhibition”.<sup>32</sup>

Both the Situation Centre and its analytical unit were staffed by “gratis military officers”, on loan from member states from Australia to Zimbabwe but disproportionately drawn from Western countries. This led to considerable suspicion on the part of developing countries and protests under the auspices of the Non-Aligned Movement. By the late 1990s this had become a politically contentious issue and the United Nations began phasing out the practice in the period 1998-1999,<sup>33</sup> taking with it the Information and Research Unit.<sup>34</sup> This reduction in UN military expertise coincided with a resurgence of peace operations, as the United Nations assumed civilian responsibilities in Kosovo and temporary sovereign responsibilities for East Timor in the same year. A major review of UN peace operations was commissioned for the following year, its first meeting coinciding with the near collapse of a third mission in Sierra Leone as a result of poor planning, under-equipped and badly trained personnel, inadequate communication, weak to the point of mutinous command and control, and determined local spoilers.<sup>35</sup>

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<sup>32</sup> F.E. van Kappen, "Strategische inlichtingen en de Verenigde Naties", *Militaire Spectator*, vol. 170, no. 11 (2001), in Wiebes, *Intelligence and Bosnia*, p. 31.

<sup>33</sup> GA Res 51/243 (15 September 1997); "UN: Fifth Committee Approves Draft Texts on Financing and Support Staff for Peacekeeping", *M2 Presswire*, 29 June 1998.

<sup>34</sup> William J. Durch et al., *The Brahimi Report and the Future of UN Peace Operations* (Henry L. Stimson Center, Washington, DC, 2003), available at <<http://www.stimson.org>>, 38.

<sup>35</sup> David M. Malone and Ramesh Thakur, "UN Peacekeeping: Lessons Learned?" *Global Governance*, vol. 7, no. 1 (2001).

*C. Intelligence and UN Reform (2000 –)*

The Report of the Panel on UN Peace Operations, known as the Brahimi Report after the panel's Algerian chairman, was established in part to justify the expansion of the UN Department of Peacekeeping Operations to compensate for the lost gratis personnel. At the same time, it touched on intelligence issues in two ways. First, at the insistence of some of the members of the panel with military backgrounds, the report stated that UN peace operations "should be afforded the field intelligence and other capabilities needed to mount a defence against violent challengers."<sup>36</sup> Though not elaborated upon, this reflected the emerging wisdom that the traditional aversion to collecting and using intelligence in peace operations was untenable.<sup>37</sup>

Secondly, however, the panel noted that the United Nations lacked a professional system for managing knowledge about conflict situations — gathering it, analysing it, and distributing it. To remedy this, the panel proposed the creation of an Information and Strategic Analysis Secretariat (EISAS).<sup>38</sup> The new body would be formed by consolidating the Department of Peacekeeping Operations Situation Centre and the handful of policy planning units scattered across the organisation, with the addition of a small team of military analysts.<sup>39</sup>

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<sup>36</sup> Report of the Panel on United Nations Peace Operations (Brahimi Report), UN Doc A/55/305-S/2000/809 (21 August 2000), available at <[http://www.un.org/peace/reports/peace\\_operations](http://www.un.org/peace/reports/peace_operations)>, para 51.

<sup>37</sup> See, eg, UN Department of Peacekeeping Operations, Comprehensive Report on Lessons Learned from United Nations Assistance Mission For Rwanda (UNAMIR) (Lessons Learned Unit, New York, December 1996), available at <<http://www.un.org/Depts/dpko/lessons/UNAMIR.pdf>>, 4.

<sup>38</sup> The initial "E" denotes yet another acronym: the Executive Committee on Peace and Security, which was established in 1997 as "the highest policy development and management instrument within the UN Secretariat on critical, cross-cutting issues of peace and security": Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects, UN Doc A/C.5/55/46/Add.1 (8 August 2001), available at <<http://www.stimson.org/fopo/pdf/pbimprepAC55546Add1.pdf>>, para 3.2.

<sup>39</sup> Brahimi Report, paras 65-75. The existing units included DPKO's Policy Analysis Unit (DPKO); DPA's Policy Planning Unit; OCHA's Policy Development Unit; and the Department of Public Information's Media Monitoring and Analysis Section.

*PRELIMINARY DRAFT*

From the moment EISAS was referred to as a “CIA for the UN” it was dead as a policy. Some states expressed concern about the United Nations being seen as involved in the business of espionage,<sup>40</sup> but the real concern appeared to be the potential for early warning to conflict with sovereignty. Following so soon after unusually blunt statements by the Secretary-General on the topic of humanitarian intervention in September 1999,<sup>41</sup> the defenders of a strict principle of non-interference found a receptive audience. The Secretary-General stressed that EISAS “should not, in any way, be confused with the creation of an “intelligence-gathering capacity” in the Secretariat”, but would merely serve as a vehicle to ensure more effective use of information that already exists.<sup>42</sup> In an effort to save at least the idea of system-wide policy analysis he later proposed a unit half the size and without media monitoring responsibilities,<sup>43</sup> but even this has failed to generate any traction.<sup>44</sup>

The lack of formal capacity has encouraged ad hoc responses. The Information and Research Unit has been replaced by informal links with military advisers from a handful of member states, supplemented as needed by states with particular expertise or capacity in a specific crisis area. Such ad hocery is replicated in procedures adopted in the field: in the absence of standard protocols for classification of information they may be invented on the fly. Predictable problems follow, as when the ad hoc label “UN-classified” is misread by military personnel as “unclassified”.

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<sup>40</sup> Brazil, for example, noted that the Secretariat should not be transformed into an intelligence-gathering institution: Fourth Committee: Agenda Item 86 - Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects (continued), UN Doc A/C.4/55/SR.21 (16 March 2001), para 75.

<sup>41</sup> See generally Kofi A. Annan, *The Question of Intervention: Statements by the Secretary-General* (New York: UN Department of Public Information, 1999).

<sup>42</sup> Report of the Secretary-General on the Implementation of the Report of the Panel on United Nations Peace Operations, UN Doc A/55/502 (20 October 2000), available at <<http://www.un.org/apps/docs/ws.asp?m=A/55/502>>, para 45.

<sup>43</sup> Implementation of the Recommendations of the Special Committee on Peacekeeping Operations and the Panel on United Nations Peace Operations, UN Doc A/55/977 (1 June 2001), available at <<http://www.un.org/apps/docs/ws.asp?m=A/55/977>>, paras 301-307.

<sup>44</sup> See generally Owen Philip Lefkon, "Culture Shock: Obstacles to Bringing Conflict Prevention Under the Wing of UN Development ... and Vice Versa", *New York University Journal of International Law and Politics*, vol. 35 (2003), pp. 711-715.

*PRELIMINARY DRAFT*

Modest advances have been made through the introduction of Joint Mission Analysis Centres (JMACs) which are intended to provide “integrated analysis of all-sources of information to assess medium- and long-term threats to the mandate and to support [mission leadership team] decision-making.”<sup>45</sup> A driving force in this area has been mission security, especially following the bombing of the UN compound in Baghdad in August 2003 and subsequent attacks on UN staff — leading to concerns that the security agenda may be subordinating the other goals of the United Nations.<sup>46</sup>

Operations authorized by but not under the auspices of the United Nations tend to be more open in their approach to intelligence. The EUFOR missions in Bosnia and the Democratic Republic of the Congo, for example, had important intelligence components but were not, strictly speaking, peacekeeping operations.

## II. Weapons Inspections

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Whereas peacekeeping operations established a clear and justified *demand* for the collection of intelligence, the use of intelligence in the context of weapons inspections is frequently driven by *supply*. Controversies over abuse of intelligence in the lead-up to the Iraq war have complicated the use of intelligence in future weapons inspections regimes — indeed, the concern today is not that intelligence will, again, be used to lead a credulous population into war but that even good intelligence will be ignored. The willingness of member states to *share* intelligence is determined by their national interest but also by the ability of the recipient to handle that intelligence effectively; the policy consequences that flow from the *use* of that intelligence are largely determined by the national interest of the members of the international organization concerned. As in the case of peacekeeping, greater accountability would be achieved by allowing greater independence on the part of bodies such as the IAEA, or specific entities such as

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<sup>45</sup> UN Department of Peacekeeping Operations and Department of Field Support, Capstone Doctrine, 71.

<sup>46</sup> See Philip Shetler-Jones, "Intelligence in Integrated UN Peacekeeping Missions: The Joint Mission Analysis Centre", *International Peacekeeping*, vol. 15, no. 4 (2008).

*PRELIMINARY DRAFT*

UNSCOM or UNMOVIC, to collect and analyse intelligence themselves, though there is no political will to do so.

*A. Justifying the War in Iraq (2002-2003)*

Over two years after the 2003 war in Iraq, London's *Sunday Times* published a secret memorandum that recorded the minutes of a meeting of British Prime Minister Tony Blair's senior foreign policy and security officials. Convening eight months prior to the invasion, their discussion of Iraq policy focused more on Britain's relationship with the United States than on Iraq itself. John Scarlett, head of the Joint Intelligence Committee, began the meeting with a briefing on the state of Saddam's regime. This was followed by an account of meetings with senior officials of the Bush Administration from Sir Richard Dearlove, head of Britain's Secret Intelligence Service (MI6), known as "C". His report was summarised in the memorandum as follows:

C reported on his recent talks in Washington. There was a perceptible shift in attitude. Military action was now seen as inevitable. Bush wanted to remove Saddam, through military action, justified by the conjunction of terrorism and [weapons of mass destruction]. But the intelligence and facts were being fixed around the policy. The [US National Security Council] had no patience with the UN route, and no enthusiasm for publishing material on the Iraqi regime's record. There was little discussion in Washington of the aftermath after military action.<sup>47</sup>

Selectivity and apparent manipulation of intelligence in the lead up to the Iraq war has been the subject of considerable discussion, as has the failure to plan for post-conflict operations. Less attention has been paid to the manner in which intelligence was eventually introduced into the United Nations.

Prior to Colin Powell's February 2003 presentation there had been much talk of an "Adlai Stevenson moment", referring to the tense scene in the Security Council in

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<sup>47</sup> Iraq: Prime Minister's Meeting (Memorandum by David Manning; Secret and Strictly Personal - UK Eyes Only) (S 195 /02, London, 23 July 2003), available in "The Secret Downing Street Memo", *The Sunday Times* (London), 1 May 2005.

*PRELIMINARY DRAFT*

October 1962 when the US Ambassador to the United Nations confronted his Soviet counterpart on its deployment of missiles in Cuba. “Do you, Ambassador Zorin, deny that the USSR has placed and is placing medium- and intermediate-range missiles and sites in Cuba?” Stevenson had asked in one of the more dramatic moments played out in the United Nations. “Don’t wait for the translation! Yes or no?” “I am not in an American courtroom, sir,” Zorin replied, “and I do not wish to answer a question put to me in the manner in which a prosecutor does—” “You are in the courtroom of world opinion right now,” Stevenson interrupted, “and you can answer yes or no. You have denied that they exist, and I want to know whether I have understood you correctly. I am prepared to wait for my answer until hell freezes over, if that’s your decision. And I am also prepared to present the evidence in this room.” Zorin did not respond. In a *coup de théâtre* Stevenson then produced poster-sized photographs of the missile sites taken by US spy planes.<sup>48</sup>

This exchange highlights the problem Powell confronted four decades later and a key dilemma in the use of intelligence in bodies such as the United Nations. Powell was presenting intelligence on Iraq that was intended to demonstrate Saddam Hussein’s non-compliance with previous Security Council resolutions. His audience heard, however — and was intended to hear — evidence. This was perhaps necessary given the various audiences to whom Powell was speaking: the members of the Council, the US public, world opinion more generally. But it meant that the onus of proof subtly shifted from Iraq being required to account for the dismantling of its weapons to the United States asserting that such weapons were in fact in Iraq’s possession. Lacking evidence as compelling as Stevenson’s, Powell persuaded only those who were already convinced.

The fact that US and British intelligence was essentially wrong on the central question of Iraq’s weapons programmes naturally dominates consideration of this issue — though it bears repeating that UNMOVIC’s Executive Chairman Hans Blix also believed that Iraq retained prohibited weapons.<sup>49</sup> This section examines the somewhat different question of how comparable intelligence might be used in bodies such as the Security Council in future. Ambassador Zorin was correct, of course, that the Council is

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<sup>48</sup> See generally Robert F. Kennedy, *Thirteen Days: A Memoir of the Cuban Missile Crisis* (New York: W.W. Norton, 1969); Robert A. Divine (ed.), *The Cuban Missile Crisis* (Chicago: Quadrangle Books, 1971).

<sup>49</sup> Hans Blix, *Disarming Iraq* (New York: Pantheon, 2004).

not a courtroom; it lacks the legitimacy and the procedures necessary to establish guilt or innocence. Nonetheless, as Stevenson replied, it may function as a chamber in the court of world opinion. In such circumstances, the limitations of intelligence as a form of risk assessment intended to guide action may conflict with the desire of policymakers to use intelligence — like the proverbial drunk at the lamppost — to support rather than illuminate their decisions.

### *B. Containing Iraq (1991-2002)*

Prior to the 2003 war, Iraq had represented a highly unusual case of intrusive inspections in the context of the series of measures adopted by the UN Security Council after the expulsion of Iraq from Kuwait in 1991. Nevertheless, the lessons learned from the two inspection missions — UNSCOM and UNMOVIC — bear directly on the larger question of what role the United Nations and other organisations can and should play in counter-proliferation activities in the future. Given the controversies over the 2003 war, there is a danger that these lessons are being ignored.

Security Council resolution 687 (1991), which provided the ceasefire terms at the end of Operation Desert Storm, established a “Special Commission” (UNSCOM) to implement the destruction of Iraq’s chemical and biological weapons programmes; the IAEA was to play a similar role in relation to Iraq’s nuclear programme.<sup>50</sup> A subsequent resolution encouraged states to provide UNSCOM with “the maximum assistance, in cash and in kind” in fulfilling its mandate — support that was understood at the time to include intelligence.<sup>51</sup>

The nature of intelligence cooperation with UNSCOM can be considered in three discrete areas. First, in the area of technical collection, UNSCOM had access to imagery from high-altitude U-2 planes from the United States. US satellite imagery was also provided, though at times with reduced detail in order to protect sources and methods.

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<sup>50</sup> SC Res 687 (1991), para 9.

<sup>51</sup> SC Res 699 (1991), para 4.

*PRELIMINARY DRAFT*

Video cameras and other unmanned sensors were installed at sensitive dual-use sites, transmitting information to the Baghdad Monitoring and Verification Centre. The German government provided helicopters with ground penetrating radar. Signals intelligence was supported by Britain, which provided sensitive communication scanners to monitor Iraqi military communications.<sup>52</sup> The Baghdad office also employed counterintelligence measures to guard against Iraqi espionage, supplemented by unorthodox tactics such as running air conditioners as loud as possible and using a large whiteboard instead of speaking.<sup>53</sup> This was unlikely to be effective against surveillance by those states providing the hardware and, in some cases, the personnel for UNSCOM's operations.

The most important revelations, however, came from a second area: human intelligence. Though UNSCOM was not running spies as such, high-level defections encouraged far greater disclosure by Iraqis than anything discovered through technical collection. One defector, Hussein Kamal, had directed Iraq's Military Industrial Commission and was one of Saddam Hussein's sons-in-law. Cooperation with UNSCOM was not the purpose of his defection — it is assumed that he was attempting to gain international support for a *coup* against Saddam — but his disclosures to UNSCOM, Western intelligence agencies, and the media about Iraq's deception of the inspectors prompted a flood of new documents from Iraq, 1.5 million of which were “discovered” on a chicken farm belonging to Kamal southeast of Baghdad. Failure to disclose the documents was explained by Iraq as due to Kamal's own “illegal” conduct, and accompanied by new pledges of cooperation with the inspectors. (Six months later, Kamal and his brother, also married to one of Saddam Hussein's daughters, had been fully debriefed and were becoming an embarrassment to their hosts in the Jordanian royal court. A move to more humble accommodation and the homesickness of the two women appear to have persuaded them to take seriously the offer of a complete pardon from Saddam Hussein. The couples duly returned to Iraq and within twenty-four hours the Kamal brothers were divorced and executed.)<sup>54</sup>

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<sup>52</sup> Dorn, "Cloak and the Blue Beret", pp. 437-438.

<sup>53</sup> Scott Ritter, *Endgame: Solving the Iraq Problem — Once and for All* (New York: Simon & Schuster, 1999), p. 25.

<sup>54</sup> *Ibid.*, pp. 47-48; Dorn, "Cloak and the Blue Beret", p. 439.

*PRELIMINARY DRAFT*

A third aspect of UNSCOM's intelligence activities was the creation of an analytical capacity. From its inception in 1991 UNSCOM depended heavily on both US information and analysis. In August that year it created an Information Assessment Unit to analyse and store imagery and inspection reports, as well as to conduct liaison with nations providing information to UNSCOM. The first four staff members were, not coincidentally, from Canada, Australia, France, and the United States.<sup>55</sup> UNSCOM's first Executive Chairman, Rolf Ekéus, cited the unit as part of a response to Iraqi challenges that UNSCOM employed CIA agents. Naturally inspectors received briefings from various services, he acknowledged, but such information was then evaluated by the Information Assessment Unit: "Sometimes it's impressive, sometimes it's useless."<sup>56</sup> It later became clear, however, that UNSCOM's relations with intelligence services went beyond the mere provision of information. Such accusations dogged Ekéus' successor, Australian diplomat Richard Butler, whom Scott Ritter, a former inspector, later accused of putting US interests ahead of the UN's.<sup>57</sup> Writing in the *New Yorker*, Seymour Hersh detailed efforts by the CIA to use UNSCOM to collect information about Iraq that was unrelated to inspections. From April 1998, Hersh wrote, the CIA took control of a recently enhanced information system that had been penetrating Iraqi efforts to conceal its weapons programme but now was focused on monitoring Saddam Hussein himself.<sup>58</sup>

The relationship between UNSCOM and member states providing intelligence was always going to be fraught. As indicated earlier, intelligence is rarely shared on an altruistic basis; at the very least interests must be seen to be aligned. In addition to the United States, UNSCOM's relationship with Israel's military intelligence service, Aman, raised eyebrows — U-2 imagery sent to Israel for assistance in analysis could easily be used for other purposes, such as future espionage or military operations.<sup>59</sup>

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<sup>55</sup> Chantal de Jonge Oudraat, "UNSCOM: Between Iraq and a Hard Place", *European Journal of International Law*, vol. 13 (2002), p. 150; Wiebes, *Intelligence and Bosnia*, p. 23.

<sup>56</sup> Judy Aita, "UN Expects to Resume Weapons Inspections in Iraq", *United States Information Agency*, 19 January 1993.

<sup>57</sup> Ritter, *Endgame*, p. 196.

<sup>58</sup> Seymour M. Hersh, "Saddam's Best Friend", *New Yorker*, 5 April 1999.

<sup>59</sup> Dorn, "Cloak and the Blue Beret", p. 440.

*PRELIMINARY DRAFT*

By the time UNMOVIC commenced inspections in Iraq the process could not have been more politicised. The role of intelligence providers was also being discussed more openly. Briefing the Council on 19 December 2002, UNMOVIC Executive Chairman Hans Blix noted that sites to be inspected in Iraq following the return of inspectors included not only those that had been declared by Iraq or inspected in the past, but also “any new sites which may become known through procurement information, interviews, defectors, open sources, intelligence or overhead imagery.”<sup>60</sup> In February 2003, as the prospects for avoiding war diminished, Blix responded to Colin Powell’s briefing of the Security Council. “We are fully aware that many governmental intelligence organisations are convinced and assert that proscribed weapons, items and programmes continue to exist,” he observed. Governments, of course, had access to sources of information that were not available to inspectors.

The inspections regime in Iraq was exceptional in both its intrusiveness and its explicit reliance on intelligence provided by the services of interested states. Larger lessons are, therefore, to be drawn with caution. UNSCOM and UNMOVIC are, arguably, a warning to the United Nations against relying upon the intelligence agencies of member states and thereby being tainted with accusations of collusion.<sup>61</sup> They are also examples of both a precedent for and the effectiveness of an analytical capacity in a UN operation handling intelligence. In part it was the ad hoc and contingent nature of cooperation with intelligence services that appears to have undermined the inspectors’ independence; if one is quite literally dependent on the United States for imagery, Israel for analysis, Britain for communications intercepts, and so on, it is not a strong bargaining position from which to insist that this assistance should come without conditions.

The question of whether such activities are appropriate for the United Nations will remain linked to the troubled question of Iraq policy for some time to come. It is possible that intrusive inspections will be used again in the context of disarmament — Iran and North Korea are plausible candidates — but for the time being the Security Council has

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<sup>60</sup> Hans Blix, Briefing of the Security Council: Inspections in Iraq and a Preliminary Assessment of Iraq’s Weapons Declaration (UNMOVIC, New York, 19 December 2002), available at <<http://www.unmovic.org>>.

<sup>61</sup> See, eg, Christopher Hitchens, “Weapons of Mass Distraction”, *Vanity Fair*, March 1999, 92.

*PRELIMINARY DRAFT*

focused its attention on more general obligations in the area of counter-proliferation. In April 2004, following the revelations of nuclear smuggling by Pakistani scientist A.Q. Khan, the Council passed resolution 1540 (2004), requiring all states to criminalise proliferation of weapons of mass destruction to non-state actors and impose effective domestic controls over such weapons and their means of delivery.<sup>62</sup> This suggested a slightly different role for the Council, more akin to that which it was playing in the area of counter-terrorism.

*C. Other Arms Control Regimes*

Members of arms control and non-proliferation agreements have a clear shared interest in verifying the implementation of such agreements. Intelligence has long formed a part of this process but in an unusual way: a number of such agreements — prominently the Anti-Ballistic Missile Treaty and the Strategic Arms Limitation (SALT I) Treaty of 1972 — rather than encouraging sharing instead merely prohibit interference with intelligence efforts (“national technical means”) aimed at verifying compliance. Unilateral verification still remains the most important check on compliance, but the establishment of comprehensive regimes in the area of nuclear proliferation has begun to change this.

Originally established in 1957 as an “atoms for peace” organisation, the International Atomic Energy Agency (IAEA) promotes the peaceful use of nuclear technology and verifies that it is not being used for military purposes. This dual role has led to predictable conflicts and occasional calls for the division of the agency into two entities. The Nuclear Non-Proliferation Treaty, signed a decade after the IAEA was created, segregated the world into nuclear and non-nuclear states, requiring those without nuclear weapons to accept “safeguards” negotiated with the IAEA to prevent the diversion of nuclear energy from peaceful uses.<sup>63</sup> Formally, the administration of these

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<sup>62</sup> SC Res 1540 (2004), paras 1-3.

<sup>63</sup> Treaty on the Non-Proliferation of Nuclear Weapons, done at Washington, London, and Moscow, 1 July 1968, in force 5 March 1970, available at <<http://www.state.gov/t/np/trty/16281.htm>>, art. 3.

*PRELIMINARY DRAFT*

safeguards consists of verifying information provided by the state in question; in practice, there is considerable reliance on information provided by other states.<sup>64</sup>

The IAEA lacks a collection capacity as such, but employs experts who are able to assess information in their possession. This works when states provide information but is least effective against those with the most to hide. By the mid-1990s the rules governing inspection and verification had come to be seen as inadequate and the IAEA developed a more stringent Model Additional Protocol, though only one-third of states parties to the Non-Proliferation Treaty (NPT) have ratified it.<sup>65</sup> In 2004 the UN High-Level Panel on Threats, Challenges, and Change recommended that the IAEA Board of Governors should recognise the Model Additional Protocol as a new basic standard for IAEA safeguards.<sup>66</sup>

The role of third states in providing information is explicitly provided for in the IAEA Statute, article VIII of which states that each member should “make available such information as would, in the judgement of the member, be helpful to the Agency”.<sup>67</sup> The IAEA itself is to “assemble and make available in accessible form” all such information, but there is no evidence that this requirement is taken literally.<sup>68</sup> On the contrary, there are occasional suggestions of the importance of intelligence provided by third states in the verification process. In the case of Iran, for example, the IAEA’s Board of Governors passed a resolution in 2003 calling for “urgent, full and close co-operation” by third

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<sup>64</sup> Statute of the International Atomic Energy Agency, done at New York, 23 October 1956, in force 29 July 1957, available at <[http://www.iaea.org/About/statute\\_text.html](http://www.iaea.org/About/statute_text.html)>, arts III, VIII.

<sup>65</sup> Model Protocol Additional to the Agreement(s) Between State(s) and the Agency for the Application of Safeguards - (International Atomic Energy Agency, INFCIRC/540, Vienna, 1997), available at <<http://www.iaea.org/Publications/Documents/Infcircs/1998/infirc540corrected.pdf>>. See Laura Rockwood, "The IAEA's Strengthened Safeguards System", *Journal of Conflict and Security Law*, vol. 7, no. 1 (2002).

<sup>66</sup> A More Secure World: Our Shared Responsibility (Report of the High-Level Panel on Threats, Challenges, and Change), UN Doc A/59/565 (1 December 2004), available at <<http://www.un.org/secureworld>>, para 129.

<sup>67</sup> IAEA Statute, art. VIII(a).

<sup>68</sup> *Ibid.*, art. VIII(b).

*PRELIMINARY DRAFT*

states in clarifying outstanding questions on Iran's nuclear programme<sup>69</sup> and later "noting with appreciation" that it had "received some information from other states that may be helpful".<sup>70</sup> In May 2008 the Director General noted that, as part of its investigation of alleged military dimensions to its nuclear programme, the IAEA had presented Iran with

information, which was provided to the Agency by several Member States, appears to have been derived from multiple sources over different periods of time, is detailed in content, and appears to be generally consistent. The Agency received much of this information only in electronic form and was not authorised to provide copies to Iran.<sup>71</sup>

One of the reasons the IAEA can be relatively open about such activity is that its role in handling confidential information is long-standing. The IAEA Statute prohibits staff disclosing "any industrial secret or other confidential information".<sup>72</sup> The Model Additional Protocol goes further, requiring the agency to maintain "a stringent regime to ensure effective protection against disclosure of commercial, technological and industrial secrets and other confidential information", which includes protocols for the handling of confidential information, conditions of staff employment relating to the protection of such information, and procedures to deal with breaches of confidentiality.<sup>73</sup>

Similar provisions are included in the Chemical Weapons Convention, drafted in 1993, which has a "Confidentiality Annex" aimed largely at protection of commercially sensitive information. Among other things, the annex provides that dissemination of confidential information within the Organisation for the Prohibition of Chemical

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<sup>69</sup> IAEA Board of Governors, Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, Resolution adopted by the Board (GOV/2003/81, 26 November 2003), available at <<http://www.iaea.org/Publications/Documents/Board/2003/gov2003-81.pdf>>, para 6.

<sup>70</sup> IAEA Board of Governors, Implementation of the NPT Safeguards Agreement in the Islamic Republic of Iran, Resolution adopted by the Board (GOV/2004/49, 18 June 2004), available at <<http://www.iaea.org/Publications/Documents/Board/2004/gov2004-49.pdf>>, preambular para (h).

<sup>71</sup> Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council resolutions 1737 (2006), 1747 (2007) and 1803 (2008) in the Islamic Republic of Iran (Report by the Director General) (GOV/2008/15, 26 May 2008), available at <<http://www.iaea.org/Publications/Documents/Board/2008/gov2008-15.pdf>>, para 16.

<sup>72</sup> IAEA Statute, art. VII(F).

<sup>73</sup> Model Additional Protocol, art. 15.

*PRELIMINARY DRAFT*

Weapons (OPCW) shall be strictly on a “need-to-know basis” and that staff shall enter into individual secrecy agreements covering their period of employment and five years afterward. In the case of a serious breach, the Director-General may waive the immunity protecting a staff member from prosecution under national law.<sup>74</sup> These protections exist even though the OPCW has significantly less intrusive inspection powers than available under the IAEA’s Model Additional Protocol.<sup>75</sup> The Biological and Toxin Weapons Convention presently lacks any form of inspection regime; the most recent efforts to develop an inspection protocol foundered in mid-2001, in large part due to opposition by the US biodefence establishment and objections from the US pharmaceutical and biotechnology industries that inspections would be costly and might compromise trade secrets.<sup>76</sup>

One way of avoiding concerns about international organisations handling sensitive information is to bypass them. On 31 May 2003 US President George W. Bush announced the creation of the Proliferation Security Initiative (PSI), a partnership of countries drawing upon national capacities to interdict shipments of weapons of mass destruction. As a kind of ongoing coalition of the willing, PSI provides a framework for “rapid exchange of relevant information” and cooperation in the interception and searching of vessels and aircraft suspected of transporting illicit weapons.<sup>77</sup> It has been effective as a means of enhancing participation in this US-led endeavour — primarily

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<sup>74</sup> Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction, done at Paris, 13 January 1993, in force 29 April 1997, available at <<http://www.opcw.org>>, Annex on the Protection of Confidential Information (“Confidentiality Annex”), paras 2(h), 9.

<sup>75</sup> The routine inspection powers of the IAEA and OPCW are comparable, but it is in the area of challenge inspections that the IAEA — at least under the Model Additional Protocol — has greater power. As yet neither regime of challenge inspections has been seriously tested: Trevor Findlay, A Standing United Nations WMD Verification Body: Necessary and Feasible (Canadian Centre for Treaty Compliance, Norman Paterson School of International Affairs, Carleton University, Ottawa, December 2005), available at <[http://www.carleton.ca/npsia/research\\_centres/cctc/docs/CC1.pdf](http://www.carleton.ca/npsia/research_centres/cctc/docs/CC1.pdf)>, 11.

<sup>76</sup> Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, done at Washington, London, and Moscow, 10 April 1972, in force 26 March 1975, available at <<http://www.opbw.org>>; Michael R. Gordon, "Germ Warfare Talks Open in London; US Is the Pariah", *New York Times*, 24 July 2001.

<sup>77</sup> Proliferation Security Initiative: Statement of Interdiction Principles (The White House, Office of the Press Secretary, Washington, DC, 4 September 2003), available at <<http://www.state.gov/t/np/rls/fs/23764.htm>>.

intended to deter trade in prohibited weapons with North Korea — but at the cost of criticism for its lack of public accountability and its political divisiveness. PSI is also seen as undermining more traditional (and, it is argued, more legitimate) mechanisms such as the United Nations and the emerging regime of the Law of the Sea.<sup>78</sup>

### III. Apprehension and Prosecution of War Criminals

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International criminal prosecution has seen more direct discussion of the legal implications of intelligence being used in international forums. Though intelligence provided by member states has been extremely useful in the investigation of crimes, when evidence had to be adduced in court this introduced problems familiar to many jurisdictions in which intelligence and law enforcement bodies operate side by side. This includes balancing the need to protect sources and thus ensure an ongoing flow of information to support effectiveness, while at the same time protecting the rights of the accused if the legitimacy of the tribunal is not to be called into question.

The use of intelligence in international criminal prosecution highlights directly the tension between the competing objectives of national security and international legitimacy. The tension is enhanced because the national interest that leads a state to share intelligence concerning war criminals is likely to be less compelling than the other situations discussed in this chapter; at the same time, the evidentiary threshold for securing a conviction in an international tribunal is considerably more rigorous.

#### *A. Intelligence and Investigation*

Access to intelligence, in the sense used here of information obtained covertly, need not be central to the prosecution of an individual before an international tribunal. But it will

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<sup>78</sup> Mark J. Valencia, *The Proliferation Security Initiative: Making Waves in Asia*, Adelphi Paper 376 (Abingdon: Routledge, 2005), pp. 71-73.

*PRELIMINARY DRAFT*

frequently be very useful. The nature of situations that fall within the jurisdiction of such tribunals and their limited investigative capacity makes traditional collection of evidence difficult. Intelligence may be a source of leads for interviews with potential witnesses; it may also provide important contextual information that deepens an investigator's understanding of a case. This demand for intelligence may also correspond to a potential supply: if the situation is a conflict zone then there will often be a number of governments collecting intelligence for their own purposes. In some circumstances these governments may be willing to share at least part of this intelligence with investigators, if not to produce it in open court.<sup>79</sup> At times this discretion may be exercised capriciously. During the Rwandan genocide, for example, the commander of the remaining UN forces in Kigali was informed that the United States had learned of plans for his assassination: "I guess I should have been grateful for the tip," Romeo Dallaire later wrote, "but my larger reaction was that if delicate intelligence like this could be gathered by surveillance, how could the United States not be recording evidence of the genocide occurring in Rwanda?"<sup>80</sup>

The question of whether and how intelligence could and should be used in international criminal prosecution arose shortly after the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY). South African judge Richard Goldstone, the first Chief Prosecutor of the Tribunal, realized the importance of having access to intelligence, especially from the United States. The problem was how to reconcile necessary procedural protection of defendants' rights with the desire of states providing intelligence to avoid compromising their sources and methods.<sup>81</sup> Rule 70 (B) of the ICTY's Rules of Procedure and Evidence was the result. It provides as follows:

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<sup>79</sup> Peter Nicholson, *The Function of Analysis and the Role of the Analyst within the Prosecutor's Office of an International Criminal Court* (International Criminal Court, Office of the Prosecutor, The Hague, 13 February 2003), available at <<http://www.icc-cpi.int/library/organs/otp/Nicholson.pdf>>, 6.

<sup>80</sup> Roméo Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (Toronto: Random House Canada, 2003).

<sup>81</sup> See Richard J. Goldstone, "Remarks: Intelligence and the Use of Force in the War on Terrorism", *American Society of International Law Proceedings*, vol. 98 (2004).

*PRELIMINARY DRAFT*

Rule 70 (B) If the Prosecutor is in possession of information which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.<sup>82</sup>

A further provision was later added to include a national security exemption from the general obligation to produce documents and information.<sup>83</sup>

Louise Arbour, who succeeded Goldstone as Chief Prosecutor, later observed that Rule 70 had been extremely useful: “It is, frankly, and we have to live in a realistic world, the only mechanism by which we can have access to military intelligence from any source.”<sup>84</sup> That utility had been especially important in the early days of the Tribunal; as its work moved from investigations to trials the dangers of accepting classified information became apparent as it prevented the Prosecutor from using the information and could curtail the rights of the defence.<sup>85</sup> Such candour about the use of intelligence indicates how much has changed from the days when intelligence itself was a dirty word in the United Nations. Indeed, the International Criminal Court (ICC) now recruits professional staff for the position of “Criminal Intelligence Analyst.”

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<sup>82</sup> Rules of Procedure and Evidence (International Criminal Tribunal for the Former Yugoslavia, IT/32, The Hague, 14 March 1994), available at <<http://www.un.org/icty/legaldoc-e>>, rule 70 (B). A frequently overlooked aspect of this provision is the requirement for the prosecution to disclose information to the accused *prior* to submitting it as evidence.

<sup>83</sup> *Ibid.*, rule 54 *bis* (a state raising such an objection a state must “identify, as far as possible, the basis upon which it claims that its national security interests will be prejudiced;” protective measures may be agreed for the hearing of this objection).

<sup>84</sup> Louise Arbour, "War Crimes Tribunals: The Record and the Prospects: History and Future of the International Criminal Tribunals for the Former Yugoslavia and Rwanda", *American University International Law Review*, vol. 13 (1998), p. 1508.

<sup>85</sup> *Ibid.* See, eg, *Prosecutor v. Élie Ndayambaje and Sylvain Nsabimana (Decision on the Defense Motions Seeking Documents Relating to Detained Witnesses or Leave of the Chamber to Contact Protected Detained Witnesses)* (ICTR, 15 November 2001) Case Nos. ICTR-96-8-T and ICTR-97-29A-T, available at <<http://www.icttr.org>> (applying comparable provision in the ICTR Rules of Procedure).

*PRELIMINARY DRAFT*

In the negotiations leading to the creation of the ICC, a number of delegations also stressed the importance of including provisions for protecting national security information.<sup>86</sup> As in the ICTY, the Rome Statute allows the Prosecutor to conclude agreements not to disclose documents or information obtained “on the condition of confidentiality and solely for the purpose of generating new evidence.”<sup>87</sup> The openness with which the issue is discussed demonstrates the increasing acceptance of intelligence issues as an important part of the work of the Court, reflected in open briefings on the topic and the creation of posts within the Office of the Prosecutor requiring experience in handling and analyzing military intelligence.<sup>88</sup>

The ICC also provides for a national security exception to requests by the Prosecutor or the Court for information or assistance, though it takes the form of a complex mechanism, based in part on an ICTY Appeals Chamber decision in the *Blaskic* case,<sup>89</sup> intended to encourage a state invoking this exception to disclose as much as possible.<sup>90</sup> “Cooperative means” are first encouraged to reach a resolution through modifying the request or agreeing on conditions to protect the threatened interest.<sup>91</sup> If such means fail and the state refuses to disclose the information or documents, the state must notify the Prosecutor or the Court “of the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in such prejudice to the

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<sup>86</sup> Michael A. Newton, "The International Criminal Court Preparatory Commission: The Way It Is & the Way Ahead", *Virginia Journal of International Law*, vol. 41 (2000), p. 212.

<sup>87</sup> Statute of the International Criminal Court (Rome Statute), UN Doc A/Conf.183/9 (17 July 1998), available at <[http://www.icc-cpi.int/library/about/officialjournal/Rome\\_Statute\\_120704-EN.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf)>, art. 54(3)(e).

<sup>88</sup> See, eg, Peter Nicholson, Testimony at Public Hearing of the Office of the Prosecutor (International Criminal Court, Office of the Prosecutor, The Hague, 17-18 June 2003), available at <[http://www.icc-cpi.int/library/organs/otp/ph/030714\\_otp\\_ph1s5\\_Peter\\_Nicholson.pdf](http://www.icc-cpi.int/library/organs/otp/ph/030714_otp_ph1s5_Peter_Nicholson.pdf)>; Bruno Cathala, Statement of the Registrar: Tenth Diplomatic Briefing of the International Criminal Court (International Criminal Court, The Hague, 26 June 2007), available at <[http://http://www.icc-cpi.int/library/about/ICC\\_DB10\\_St\\_En.pdf](http://http://www.icc-cpi.int/library/about/ICC_DB10_St_En.pdf)>.

<sup>89</sup> *Prosecutor v. Tihomir Blaskic (Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997)* (ICTY Appeals Chamber, 29 October 1997) Case No. IT-95-14, available at <<http://www.un.org/icty>>, para 68.

<sup>90</sup> Rome Statute, art. 72.

<sup>91</sup> *Ibid.*, art. 72(5).

State's national security interests.”<sup>92</sup> If the Court nevertheless determines that the evidence is relevant and necessary for the establishment of the guilt or innocence of an accused, it may refer the matter to the Assembly of States Parties or, if the Security Council referred the matter to the Court, to the Council.<sup>93</sup> An important departure from the *Blaskic* formula is the apparent reversal of the presumption that states are obliged to disclose information; in the ICC Statute the emphasis is on the right of states to deny the Court's request for assistance.<sup>94</sup> In *Blaskic* this obligation was linked to the use of Chapter VII by the Security Council in establishing the Tribunal;<sup>95</sup> as the ICC lacks such coercive powers, specific obligations to disclose information may require action by the Council on a case-by-case basis. (The *Blaskic* case also demonstrates the importance of intelligence in providing exculpatory evidence, the release of which led to the defendant on appeal having his sentence drastically reduced and being granted an early release.<sup>96</sup>)

### B. Maintaining Independence

Though most consideration of intelligence and international criminal prosecution tends to focus on the difficulty of obtaining evidence in a form that may be presented in court, in some circumstances the problem may be too much support. This may call into question the independence of the proceedings, as was alleged in the Special Court for Sierra Leone in 2004. A defence motion argued that the Prosecutor's independence had been compromised by the close relationship between its Chief of Investigations and the US

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<sup>92</sup> Ibid., art. 72(6).

<sup>93</sup> Ibid., arts. 72(7)(a)(ii), 87(7). The Court is also authorized to “make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances.” Rome Statute, art. 72(7)(a)(iii). In limited circumstances the Court may order disclosure. Rome Statute, art. 72(7)(b)(i).

<sup>94</sup> Antonio Cassese, "The Statute of the International Criminal Court: Some Preliminary Reflections", *European Journal of International Law*, vol. 10 (1999), pp. 166-167.

<sup>95</sup> *Blaskic* 29 October 1997 (), para 68. See Ruth Wedgwood, "International Criminal Tribunals and State Sources of Proof: The Case of Tihomir Blaskic", *Leiden Journal of International Law*, vol. 11 (1998).

<sup>96</sup> *Prosecutor v. Tihomir Blaskic (Judgement)* (ICTY Appeals Chamber, 29 July 2004) Case No. IT-95-14, available at <<http://www.un.org/icty>>.

*PRELIMINARY DRAFT*

Federal Bureau of Investigation (FBI).<sup>97</sup> In its response, the Office of the Prosecutor drew a distinction between its dual obligations to investigate and prosecute, emphasizing the important role of external assistance during investigations while distinguishing this from taking instructions from any entity.<sup>98</sup> Rule 39 of the Rules of Procedure and Evidence, for example, provides that in the course of an investigation the Prosecutor may seek “the assistance of any State authority concerned, as well as of any relevant international body including the International Criminal Police Organization (INTERPOL).”<sup>99</sup> The Court, setting what appeared to be an unusually high burden of proof, rejected the defence motion on the basis that it had not demonstrated a “master-servant” relationship between the FBI and the Office of the Prosecutor.<sup>100</sup>

Protecting the integrity of intelligence sources is likely to be important to the medium-term success of international tribunals generally and the International Criminal Court in particular. Soon after the Security Council referred the situation in Darfur to the ICC in March 2005,<sup>101</sup> the Secretary-General transmitted a sealed list of 51 individuals

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<sup>97</sup> Motion Seeking Disclosure of the Relationship Between the United States of America's Government and/or Administration and/or Intelligence and/or Security Services and the Investigation Department of the Office of the Prosecutor (Special Court for Sierra Leone, *The Prosecutor v. Issa Hassan Sesay, Morris Kallon, and Augustine Gbao*, Case No. SCSL-04-15-T, Freetown, 1 November 2004). The motion asserted that the Prosecutor had “worked with and/or at the behest of and/or in conjunction with” the FBI. This was said to be contrary to Article 15(1) of the Statute, which prohibits the Prosecutor “receiv[ing] instructions from any Government or from any other source.” Statute of the Special Court for Sierra Leone 16 January 2002), available at <<http://www.sc-sl.org/scsl-statute.html>>, art. 15(1).

<sup>98</sup> Prosecution Response to Sesay's "Motion Seeking Disclosure of the Relationship Between the United States of America's Government and/or Administration and/or Intelligence and/or Security Services and the Investigation Department of the Office of the Prosecutor" (Special Court for Sierra Leone, *The Prosecutor v. Issa Hassan Sesay, Morris Kallon, and Augustine Gbao*, Case No. SCSL-04-15-T, Freetown, 16 November 2004). The Prosecution relied on Rules 8 (C) (D) and (E), 39, and 40 of the Rules of Procedure and Evidence, which make reference to assistance from other states, as well as the *Blaskic* decision, which noted that international tribunals “must rely on the cooperation of States.” *Blaskic* 29 October 1997, para 29.

<sup>99</sup> Rules of Procedure and Evidence (Special Court for Sierra Leone, Freetown, 12 April 2002), available at <<http://www.sc-sl.org/scsl-procedure.html>>, Rule 39(iii).

<sup>100</sup> *Prosecutor v. Issa Hassan Sesay, Morris Kallon, and Augustine Gbao (Decision on Sesay Motion Seeking Disclosure of the Relationship Between Governmental Agencies of the United States of America and the Office of the Prosecutor)* (Special Court for Sierra Leone, 2 May 2005) Case No. SCSL-04-15-T, 14.

<sup>101</sup> SC Res 1593 (31 March 2005).

named by the UN International Commission of Inquiry as suspects of grave international crimes;<sup>102</sup> it appears that neither the Secretary-General nor the members of the Council knew the contents of this list and transmitted it to the Prosecutor of the ICC unopened. Developing procedures for maintaining confidentiality will help to build trust on the part of those who might provide intelligence to the ICC. At the same time, however, the independence of the ICC and its ad hoc and hybrid cousins depends on more than avoiding a “master-servant” relationship with the intelligence agencies of the United States. Avoiding even the impression of inappropriate relationships will depend on diversifying the sources of intelligence and strengthening the capacity to receive and analyze them with a critical and impartial eye.

### *C. Apprehension*

A final area in which intelligence has been both important and troubling is the apprehension of suspects. This had been a particular problem for the ICTY until mid-1997 when the United States and its allies agreed to use intelligence and military capacities to apprehend war criminals. Even then, the failure to locate the two most important suspects from the Bosnian war — Radovan Karadzic and Ratko Mladic — was an embarrassment for the ICTY and its supporters. When Karadzic was ultimately arrested in 2008, the ease with which he appeared to have been living in Belgrade was interpreted as an indication that intelligence resources had not been fully devoted to locating him until it suited the purposes of key states to do so.

## **IV. Conclusion**

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The problematic use of intelligence in international criminal prosecutions points to two larger caveats on increasing access to intelligence, whether in an international tribunal or

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<sup>102</sup> Report of the International Commission of Inquiry on Darfur to the Secretary-General Pursuant to Security Council Resolution 1564 (2004) of 18 September 2004, UN Doc S/2005/60, Annex (1 February 2005), available at <<http://documents.un.org>>, 5.

*PRELIMINARY DRAFT*

in the Security Council or another international organization. The first is that intelligence may be overvalued. Officials with limited past access to intelligence sometimes attach disproportionate weight to information bearing the stamp “secret,” or which is delivered by the intelligence service of a member state. Since any such material will normally be provided without reference to the sources and methods that produced it, credulity must be tempered by prudence. A second caveat is the corresponding danger of undervaluing unclassified or open source material. Intelligence is sometimes likened to quality journalism; a reasonable corollary is that good journalists frequently produce material that is comparable to the intelligence product of some services. The United Nations itself collects large amounts of information and analysis, though it is not organized systematically. In addition, non-governmental organizations are increasingly providing better and timelier policy advice than the United Nations and, on occasion, its member states.<sup>103</sup>

The use of intelligence, then, creates both opportunities and dangers. Though it is improbable that states will come to regard it as a kind of international “public good” to be provided to international organizations for collective security purposes,<sup>104</sup> effective peacekeeping and multilateral responses to the threats of proliferation and terrorism will depend on intelligence sharing, while international criminal prosecution will continue to rely on such support at least for the purpose of investigations. The danger is that passivity on the part of the receiving body will undermine the legitimacy of multilateral institutions and processes by the reality or the perception of unilateral influence.

With respect to the legal standards and accountability for the use of intelligence, this varies significantly as between the three areas considered here. There has never been

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<sup>103</sup> One of the more prominent is Crisis Group: despite its centrality as a threat for Australia and its obvious interest to the United States, the best work on the nature and structure of Jemaah Islamiyah (JI) was undertaken by Crisis Group’s Sidney Jones. See, eg, Crisis Group, *Indonesia: Jemaah Islamiyah’s Publishing Industry* (ICG Asia Report No. 147, Jakarta/Brussels, 28 February 2008), available at <<http://www.crisisgroup.org>>. Disclosure: The author was seconded to Crisis Group as its Director of UN Relations in the New York office from late 2003 to early 2004.

<sup>104</sup> Cf Turner, *Secrecy and Democracy*, pp. 280-285; William E. Colby, “Reorganizing Western Intelligence”, in Carl Peter Runde and Greg Voss (eds.), *Intelligence and the New World Order: Former Cold War Adversaries Look Toward the 21st Century* (Bustehude: International Freedom Foundation, 1992), pp. 126-127.

*PRELIMINARY DRAFT*

a formal challenge as to whether the United Nations has the power to undertake intelligence collection activities. It would appear that this power would be included as an implied power necessary to carry out its other responsibilities<sup>105</sup> and apparently accepted by member states — which acknowledged the right of the Organization to use codes in 1946<sup>106</sup> and have subsequently tolerated its various intelligence-like functions.

Ironically, however, legal controls on the use of intelligence in international forums become stronger as the potential consequences are limited. There is no formal check on the Security Council's authorization to use force against a perceived threat to international peace and security — and ambiguous criteria for evaluating a state's claim to be acting in self-defence. In the case of targeted financial sanctions, stricter limits have been imposed on a regime that freezes the assets of a few hundred people with elaborate humanitarian exemptions than applied to the regime accused of killing half a million Iraqis.<sup>107</sup> And for international prosecution, the single alleged war criminal receives by far the greatest protection from dubious recourse to intelligence sources.

This is not to suggest that legal accountability is the only manner in which the exercise of coercive power may be constrained. Other means include negotiation constraints, checks and balances, the threat of unilateral action, and so on, pointing to an important distinction between legal and political accountability. *Legal* accountability typically requires that a decision-maker has a convincing reason for a decision or act. *Political* accountability, by contrast, can be entirely arbitrary.<sup>108</sup> The UN Security Council was created as an archetypically political body, but as its activities have come to impact on individuals the demands for legal forms of accountability will increase.

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<sup>105</sup> *Certain Expenses of the United Nations (Advisory Opinion)* (1962) ICJ Rep 286, available at <<http://www.icj-cij.org>>, 167.

<sup>106</sup> Convention on the Privileges and Immunities of the United Nations, 13 February 1946, 1 UNTS 15, available at <<http://www1.umn.edu/humanrts/instree/p&i-convention.htm>>, art. III, s 10.

<sup>107</sup> See Iain Cameron's chapter.

<sup>108</sup> In an election, for example, voters are not required to have reasons for their decision — indeed, the secrecy of the ballot implies the exact opposite: it is generally unlawful even to ask a voter why he or she voted one way or another. John Ferejohn, "Accountability and Authority: Toward a Theory of Political Accountability", in Adam Przeworski, S.C. Stokes, and B. Manin (eds.), *Democracy, Accountability, and Representation* (Cambridge: Cambridge University Press, 1999).

*PRELIMINARY DRAFT*

Shortly after the Madrid bombings of March 11, 2004, the Council passed a resolution condemning the attacks, which it stated were “perpetrated by the [Basque] terrorist group ETA.”<sup>109</sup> The resolution was adopted despite German and Russian efforts to include in the text the modifier “reportedly” to reflect uncertainty about this attribution, which appeared to be intended to bolster the Aznar government’s chances in a national election held three days later.<sup>110</sup> It was soon established that the uncertainty was well-founded, though even the subsequent arrest of extremist Islamists did not prompt a correction, an apology, or even a statement from the Council.<sup>111</sup>

There are few consequences for the Council itself when it is wrong. Entrusted to deal with “threats” to international peace and security, it cannot be expected to function as a court of law — though it is no longer tenable to pretend that it does not at least function as a kind of jury. The latter role has been expanded by the Council’s move into areas where the determination of a threat to the peace is far more complex than tracking troop movements across international borders. This is only part of a larger transformation in the activities of the Council: instead of merely responding to such threats, it increasingly acts to contain or pre-empt them. Its expanding responsibilities have ranged from the listing of alleged terrorist financiers for the purposes of freezing their assets to administering territories such as Timor-Leste and Kosovo. These activities have prompted calls for greater accountability of the Council, or at least wider participation in its decision-making processes.

As the Council has begun to act in the sphere of counter-terrorism and counter-proliferation, its dependence on intelligence findings has introduced slightly different legitimacy problems. A useful thought experiment is to consider what would have happened if the Council had accepted Colin Powell’s February 2003 presentation at face value, voting to authorize a war to rid Iraq of its concealed weapons of mass destruction.

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<sup>109</sup> SC Res 1530 (2004), para. 1.

<sup>110</sup> See, eg, Dale Fuchs, "Investigation of Madrid Bombings Shows No Link to Basque Group, Spanish Minister Says", *New York Times*, 30 March 2004.

<sup>111</sup> For a rare exception, see Letter dated 15 March 2004 from the Permanent Representative of Spain to the United Nations addressed to the President of the Security Council, UN Doc S/2004/204 (15 March 2004), available at <<http://documents.un.org>>.

*PRELIMINARY DRAFT*

For President Bush and Prime Minister Blair, the absence of weapons was a political embarrassment that could be survived. For the Council, it would have undermined the one thing that the United Nations could bring to the issue: some small amount of legitimacy.