

# STATE COMPLIANCE WITH INTERNATIONAL LAW IN INTELLIGENCE MATTERS: A BEHAVIOURAL APPROACH

Sophie Duroy\*

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## Abstract

Decision-making in intelligence matters is often assumed to be an extra-legal process. This article however shows that the determining factor in compliance is a legal one: the likelihood of the state being held effectively accountable for a breach of international law. Through a behavioural analysis of state conduct in intelligence matters and the modelling of intelligence decision-making, the article demonstrates that state behaviour in intelligence matters can be explained and predicted. Taking compliance as the standard for assessing the effectiveness of regulation, this finding has strategic implications for the actors of the international legal order attempting to enhance compliance. Specifically, increasing the likelihood of effective accountability increases the probability of compliance and decreases the weight given to extra-legal and domestic considerations in decision-making, regardless of the activity and state considered. Hence, rather than focussing on the regulatory framework itself (international law), regulatory approaches aiming to enhance compliance should focus on improving accountability.

Keywords: intelligence; accountability; compliance; behavioural analysis; decision-making; regulation.

\* Fellow, KFG Berlin Potsdam ‘The International Rule of Law: Rise or Decline?’  
[sophie.duroy@kfg-intlaw.de](mailto:sophie.duroy@kfg-intlaw.de)

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## I. INTRODUCTION

Contrary to oft-held assumptions, intelligence activities<sup>1</sup> are comprehensively addressed by existing international legal rules. These rules indirectly govern the motives, methods, and conducts necessary to operationalise intelligence activities.<sup>2</sup> This means that when states violate their international legal obligations in conducting intelligence activities, their international responsibility is engaged. Yet, although states have been held accountable for internationally wrongful acts deriving from intelligence activities, the role played by international law in intelligence decision-making remains an open question.

Intelligence decision-makers are often portrayed as following a rational choice model, impartially balancing the costs and benefits of a course of action for the nation's security.<sup>3</sup> Decision-makers are thus assumed to be rational, and international law to be of little relevance in this process. Yet, a behavioural approach to intelligence and national security shows that intelligence analysts and decision-makers are subject to many biases and heuristics, making a simple rational choice model inadequate to accurately represent decision-making. Beyond the assumed simple costs-benefits analysis, a behavioural approach uncovers other extra-legal and legal factors influencing decision-making. They need to be accounted for in any model claiming to accurately represent decision-making. One of these factors, the post-9/11 increase of state accountability for wrongful acts deriving from intelligence activities, has dramatically altered the costs and payoffs associated with these intelligence activities in recent years.

This article argues that the likelihood of effective accountability, a legal factor, now represents the most important variable to explain and determine whether a state will comply with international law in its intelligence activities. As I conceptualised it, international legal accountability is the process by which a state legally justifies its performance vis-à-vis other international actors, in which an assessment or judgement of that performance against international legal standards is rendered, and through which consequences can be imposed if the state fails to live up to applicable international legal standards.<sup>4</sup> It encompasses all supporting and sanctioning actions by the international legal order and includes persuasion, capacity-building and education, as well as dialogue-based enforcement, deterrence measures, and outcasting. Accountability is deemed effective when it induces a desired change in state behaviour. The likelihood of effective accountability should thus be understood as the extent to which a state's behaviour will be affected by the available supporting and sanctioning tools, a variable that can be measured. By modelling

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<sup>1</sup> Intelligence activities can be defined as all activities performed by intelligence communities, thus encompassing the collection, analysis, processing, and sharing of information; as well as international intelligence cooperation and what is commonly known as covert action, i.e. secret operations designed to influence political, economic, or military conditions abroad.

<sup>2</sup> Sophie Duroy, 'The Regulation of Intelligence Activities under International Law' (Unpublished PhD Thesis, European University Institute 2020, available for consultation at the EUI Library) 19-63.

<sup>3</sup> The latest publicised example concerns MI5's "Guidelines on the Use of Agents who participate in Criminality – Official Guidance", which stipulate that authorisation for an MI5 agent to commit a criminal act may be given where "the potential harm to the public interest from the criminal activity is outweighed by the benefit to the public interest derived from the anticipated information the agent may provide". This guidance was deemed lawful by the England and Wales Court of Appeal on 9 March 2021, Case No: T3/2020/0317 [2021] EWCA Civ 330.

<sup>4</sup> Sophie Duroy, 'Remedying Violations of Human Dignity and Security: State Accountability for Counterterrorism Intelligence Cooperation' in Christophe Paulussen and Martin Scheinin (eds), *Human Dignity and Human Security in Times of Terrorism* (TMC Asser Press 2020) 135.

decision-making in intelligence matters through a bounded rational choice equation, the article shows that the likelihood of effective accountability explains and determines whether a state will comply with international law in its intelligence activities.

This finding holds significant implications for actors aiming to improve compliance with international law. Increasing the likelihood of effective accountability increases the probability of compliance and decreases the weight given to domestic and extra-legal (by reference to international law) considerations in decision-making, regardless of the intelligence activity and state considered. Hence, rather than focussing on the regulatory framework itself (international law), regulatory approaches aiming to enhance compliance should focus on improving accountability, targeting both the available supporting and sanctioning tools and the decision-making factors influenced by these tools.

The article first demonstrates the relevance of a behavioural approach to national security intelligence, highlighting several biases and heuristics affecting analysis and decision-making, and their implications for regulation (Part II). It then proceeds by modelling executive decision-making in intelligence matters, integrating legal and extra-legal factors into a bounded rational choice equation that accounts for these biases and heuristics (Part III). Finally, a comparative case-study using France and the United States as most-similar cases illustrates the functioning of the model and the explanatory role of the likelihood of effective accountability in intelligence decision-making (Part IV). Part V concludes.

## **II. A BEHAVIOURAL APPROACH TO NATIONAL SECURITY INTELLIGENCE**

States are bounded rational entities, in the sense that the determination of their interests, preferences and motives is a function of the limits of their rationality and can be influenced by various cognitive and social factors.<sup>5</sup> This does not change in national security matters, which constitute the core of intelligence work. However, whereas in other issue areas states sometimes exemplify altruistic and fairness considerations, such is not the case in national security matters. Indeed, one cannot find any example of a state showing bounded self-interest when its national security is at stake. Rather, national security requires that one acts in the *national interest*. States should therefore be considered self-interested when dealing with a (perceived or actual) threat to their national security.

In national security matters, the acute demands for a feeling of security and the need to show that ‘everything’ is being done to counter threats to the security of state institutions and its population often lead to responses that deviate from the rationality assumption in that they are ineffective to counter the threat. Such responses frequently take the form of recourse to extra-legal measures such as torture and arbitrary detention; discriminatory laws and practices; unlawful surveillance; a reduction in rights and liberties; etc. Whereas these measures are ineffective in providing enhanced security to the population (human security),<sup>6</sup> they may nevertheless be

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<sup>5</sup> Anne van Aaken, ‘Behavioral International Law and Economics’ (2014) 55 Harvard International Law Journal 62; Tomer Broude, ‘Behavioral International Law’ [2015] 163 U. Pa. L. Rev. 1099; Anne van Aaken and Tomer Broude, ‘The Psychology of International Law: An Introduction’ (2019) 30 European Journal of International Law 1225.

<sup>6</sup> See e.g. Christian Bjørnskov and Stefan Voigt, ‘When Does Terror Induce a State of Emergency? And What Are the Effects?’ (2020) 64 Journal of Conflict Resolution 579; Seung-Whan Choi, ‘Fighting Terrorism through the

considered effective in serving other purposes. In particular, they may enhance the security of governmental institutions (national security in a narrow sense) and provide domestic advantages to decision-makers. Responses that would, at first sight, appear irrational to counter national security threats may therefore well be rational responses when considered from other perspectives, including that of institutional and individual decision-makers. A behavioural approach to intelligence decision-making is thus needed to understand the motives underlying states' responses and redefine rational behaviour in intelligence matters (section A). This approach further proves crucial to identify compliance-enhancing factors (section B).

### **A. A Behavioural Approach to Intelligence Decision-Making**

A behavioural approach is first useful to understand the biases of intelligence analysts and decision-makers in assessing national security threats. Threat assessments are not produced by rational actors. This is primarily because intelligence analysts' interpretations are influenced by their general beliefs and theories.<sup>7</sup> Not only are analysts' worldviews and assessments subject to most of the same biases and heuristics that can be found in an educated public, but the weakness and uncertainty of intelligence and the absence of clear feedback on analytic insights also allow them to follow their own preferences and intuitions when interpreting ambiguous information,<sup>8</sup> and to do so with (over)confidence due to their insider position and expertise.<sup>9</sup>

Intelligence agencies' insular organisational culture and structural secrecy also render them particularly vulnerable to groupthink,<sup>10</sup> "a mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members' strivings for unanimity override their motivation to realistically appraise alternative courses of action".<sup>11</sup> In-group mentalities hinder the expression of dissent and may lead to the exclusion of relevant information from consideration in analysis and decision-making processes. Groups also fall victim to an information-sharing bias, whereby group decisions are based on information that all members possess before discussion

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Rule of Law?' (2010) 54 *Journal of Conflict Resolution* 940; Laura Dugan and Erica Chenoweth, 'Moving Beyond Deterrence: The Effectiveness of Raising the Expected Utility of Abstaining from Terrorism in Israel' (2012) 77 *American Sociological Review* 597; Christian Bjørnskov and Stefan Voigt, 'You Don't Always Get What You'd Expect - On Some Unexpected Effects of Constitutional Emergency Provisions' (Social Science Research Network 2018).

<sup>7</sup> Martha Whitesmith, 'Experimental Research in Reducing the Risk of Cognitive Bias in Intelligence Analysis' (2020) 33 *International Journal of Intelligence and CounterIntelligence* 380.

<sup>8</sup> Robert Jervis, *Why Intelligence Fails: Lessons from the Iranian Revolution and the Iraq War* (Cornell University Press 2010). Richards J Heuer Jr, *Psychology of Intelligence Analysis* (2nd edition, Pherson Associates, LLC 2007). Uri Bar-Joseph and Rose McDermott, *Intelligence Success and Failure: The Human Factor* (Oxford University Press 2017). Bess J Puvathingal and Donald A Hantula, 'Revisiting the Psychology of Intelligence Analysis: From Rational Actors to Adaptive Thinkers.' (2012) 67 *American Psychologist* 199, 202.

<sup>9</sup> National Research Council (U.S.) (ed), *Intelligence Analysis for Tomorrow: Advances from the Behavioral and Social Sciences* (National Academies Press 2011) 34; Paul Slovic, Baruch Fischhoff and Sarah Lichtenstein, 'Facts versus Fears: Understanding Perceived Risk' in Daniel Kahneman, Paul Slovic and Amos Tversky (eds), *Judgment under Uncertainty* (1st edn, Cambridge University Press 1982).

<sup>10</sup> *ibid* pp. 66-68. Oren Gross, 'Security vs. Liberty: On Emotions and Cognition' in David Jenkins, Amanda Jacobsen and Anders Henriksen (eds), *The long decade: how 9/11 changed the law* (Oxford University Press 2014) 58.

<sup>11</sup> Irving L Janis, *Groupthink: Psychological Studies of Policy Decisions and Fiascoes* (2nd ed, Houghton Mifflin 1982) p. 9.

(shared information) rather than on information known to only one member (unshared information).<sup>12</sup> In the intelligence context, this means that “key judgments for policymakers might disproportionately be based on a small subset of easily interpretable intelligence”.<sup>13</sup> In a community where secrecy, the need-to-know, the need to form judgments in ambiguous situations and time pressure are ever-present conditions of decision-making, the information sharing bias thus further hinders the quality of analysts’ predictions.<sup>14</sup>

Intelligence agencies are themselves bounded rational entities, but they are also self-interested entities. Agencies’ funding, powers, and legitimacy are a direct function of their assessment of national security threats. Intelligence agencies possess an informational advantage over other governmental actors. They can use this advantage to mould the general public’s perceptions of the threats and risks incurred, to influence the budget dedicated to national security concerns, and to request ‘necessary’ increases in their powers.<sup>15</sup> Such direct self-serving bias and conflict of interests preclude any claim to objectivity and neutrality.<sup>16</sup> Yet, administrations often take intelligence agencies’ threat assessments at face value. These elements highlight the fallibility of the threat assessments relied on by states’ institutions and decision-makers.

Secondly, behavioural approaches allow us to better understand the responses adopted by intelligence and policy decision-makers. Decision-makers must often act on incomplete information while fearing future attacks and facing differing, sometimes contradictory, interests. The boundedness of their rationality leads even the most virtuous decision-makers to use heuristics when choosing a course of action.<sup>17</sup> The availability bias<sup>18</sup> and representativeness heuristics,<sup>19</sup> in particular base-rate<sup>20</sup> and gambler’s fallacies,<sup>21</sup> may thus lead governments to not only fallaciously assess threats, but also to adopt extreme, stigmatising and discriminatory responses to past attacks and

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<sup>12</sup> Garold Stasser and William Titus, ‘Pooling of Unshared Information in Group Decision Making: Biased Information Sampling during Discussion.’ (1985) 48 *Journal of Personality and Social Psychology* 1467.

<sup>13</sup> Puvathingal and Hantula (n 8) 206.

<sup>14</sup> Puvathingal and Hantula (n 8) 203–204, 206.

<sup>15</sup> Gross (n 10) 56–57.

<sup>16</sup> Ryan Alford, ‘The Harbinger Theory of Terrorism and the Rule of Law: The Danger of “Balancing” Non-Derogable Rights against Security When Relying on Threat Assessments Produced by Self-Interested Intelligence Agencies’ (2018) 22 *The International Journal of Human Rights* 1285.

<sup>17</sup> Daniel Kahneman, Paul Slovic and Amos Tversky (eds), *Judgment under Uncertainty: Heuristics and Biases* (Cambridge University Press 1982).

<sup>18</sup> A cognitive bias whereby individuals assess the frequency of an event based upon how easily they can recall an instance of it. Individuals particularly tend to overestimate the likelihood of dramatic events attracting significant media coverage or triggering strong emotions. Kahneman, Slovic and Tversky (n 17) 164.

<sup>19</sup> A cognitive bias leading individuals to evaluate an event’s probability by assessing how closely it relates to available data, ignoring the relevance of base rates in assessing probability. Kahneman, Slovic and Tversky (n 17) 163–164.

<sup>20</sup> When decisions are largely based on representativeness, other relevant information might not be sufficiently considered. The prior probability, or base-rate frequency of outcomes, describing the frequency of an event in the population or in the past, is one kind of such information. Kahneman, Slovic and Tversky (n 17) 153–154.

<sup>21</sup> Gambler’s fallacy is present when small samples are deemed to be representative of the general context. In such cases, a person ignores the statistical independence of events. Kahneman, Slovic and Tversky (n 17) 7–8.

current threats.<sup>22</sup> Systemic and embedded institutional racist, sexist and exceptionalist biases also greatly influence the assessment of, and responses to threats, yielding counterproductive results.<sup>23</sup>

In addition, domestic pressure often works against the adoption of internationally lawful and effective responses. The public's biases may indeed push decision-makers towards courses of action that satisfy their electorate, without however presenting any long-term benefit for the public or the state itself.<sup>24</sup> When fearing an attack, citizens expect their government to respond to the threat. Action bias predicts that the more unusual or drastic the response, the stronger its psychological reassuring effect on the population.<sup>25</sup> The risk of a violent attack from a terrorist organisation or a hostile state could well still be the same, but national security will have profited in the trade-off: the position of governmental institutions is now more secure and executive powers have increased. However, this does not mean that individuals' security has benefited in any way from this governmental exercise of power. Quite the opposite, for the benefit of such psychological reassurance, civil liberties may have been traded-off, the rule of law undermined, and security as a social good damaged.<sup>26</sup> Therefore, to respond to citizens' fear and/or to appear tough – both motives being irrelevant to the effective fight against a genuine national security threat – the government further threatens (national) security as a social good.<sup>27</sup>

From an external perspective, the rationality of this course of action is at best doubtful and could be explained by moral panics.<sup>28</sup> However, from the point of view of state leaders, this may well be a rational use of the public's fears.<sup>29</sup> Indeed, political leaders may consider that their interest in re-election, for instance, takes priority over the state's interest in dealing effectively with the threat. This is particularly likely following an attack, when outsiders are blamed and the crisis leads to heightened individual and group consciousness.<sup>30</sup> Since violent crises are consensus-generating events, in-group bias and group polarisation predict that when the measure adopted targets outsiders (or non-citizens), political leaders are likely to receive strong support from the electorate, while incurring little political costs.<sup>31</sup>

Representativeness heuristics also trigger problematic theories, such as the 'harbinger theory' identified by Robert Diab, according to which

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<sup>22</sup> Alexander Schulan, 'Behavioural Economics of Security' (2019) 4 *European Journal for Security Research* 273; Marc Sageman, 'The Implication of Terrorism's Extremely Low Base Rate' (2021) 33 *Terrorism and Political Violence* 302.

<sup>23</sup> E.g. Western intelligence agencies' assessment of the threat posed by al Qaeda before 9/11, and their responses to it both before and after.

<sup>24</sup> Bjørnskov and Voigt (n 6).

<sup>25</sup> Jeremy Waldron, *Torture, Terror, and Trade-Offs: Philosophy for the White House* (Oxford University Press 2010) 44.

<sup>26</sup> Waldron (n 25) 45.

<sup>27</sup> 'Human rights impact of policies and practices aimed at preventing and countering violent extremism', Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism Fionnuala Ní Aoláin, A/HRC/43/46, 21 February 2020.

<sup>28</sup> Gross (n 10) 52.

<sup>29</sup> Bjørnskov and Voigt (n 6).

<sup>30</sup> Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press 2006) 220–227.

<sup>31</sup> Gross and Ní Aoláin (n 30) 220–227; Gross (n 10) 50.

9/11 was the harbinger of a new order of terror, in which further attacks in North America are likely to occur at some point in the near future, on a similar or greater scale as 9/11, possibly, but not necessarily, involving weapons of mass destruction ... [a]nd on this basis, earlier assumptions about the absolute limits of state force against individuals have come to seem untenable or imprudent.<sup>32</sup>

The harbinger theory permanently erodes the rule of law by implying the necessity of trade-offs between individual freedoms and state power in the name of ‘security’. What happens, however, is a trade-off between security as a social good (human security) and the security of governmental institutions (national security in a narrow sense), the sole beneficiary of this balancing exercise.<sup>33</sup>

In addition, both leaders acting in their personal interest and those representing the state’s may exhibit what Daniel Kahneman and Jonathan Renshon have called ‘hawkish biases’.<sup>34</sup> According to them, the biases uncovered by psychological research favour hawkish decisions in conflict situations, i.e. they favour suspicion, hostility and aggression. The seven cognitive biases they examine<sup>35</sup> thus increase the probability that agents will act more ‘hawkishly’ than an objective observer would deem appropriate. In national security matters, which often take the form of (potential) conflict situations, decision-makers within the state would thus tend to react more aggressively than necessary, potentially triggering an escalation of threats and hostilities and bringing about counterproductive results.

Is it rational for decision-makers to favour national security over human security even if this strategy fails to adequately respond to the threat the nation faces? Objectively, no. Subjectively, however, decision-makers face domestic pressures (elections, parliamentary commissions, public opinion, protests, etc.) that frame the issue negatively, encouraging risk-seeking behaviour and preferences for appearing ‘tough’.<sup>36</sup> Hindsight bias may likewise encourage tough responses to past attacks to avoid being blamed for failing to prevent future threats,<sup>37</sup> together with extreme measures to correct previous failures, resulting in a sort of ‘accountability ping-pong’.<sup>38</sup> Leaders may also rationally consider that their personal or professional interest takes priority over the state’s interest and utilise the public’s biases to advance it. The answer is therefore more nuanced.

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<sup>32</sup> Robert Diab, *The Harbinger Theory: How the Post-9/11 Emergency Became Permanent and the Case for Reform* (Oxford University Press 2015) 99–100.

<sup>33</sup> I wrote more extensively about the fallacies of trade-offs and the risk they pose to human and national security in Duroy (n 4) 126–129.

<sup>34</sup> Daniel Kahneman and Jonathan Renshon, ‘Hawkish Biases’ [2009] *American Foreign Policy and the Politics of Fear: Threat Inflation since 9/11* 79.

<sup>35</sup> Positive illusions; fundamental attribution error; illusion of transparency; endowment effect/loss aversion; risk seeking in losses; pseudo-certainty; and reactive devaluation.

<sup>36</sup> Amos Tversky and Daniel Kahneman, ‘The Framing of Decisions and the Psychology of Choice’ (1981) 211 *Science* 453.

<sup>37</sup> Hindsight bias refers individuals’ tendency to overestimate an event’s likelihood after they observe its occurrence. As Oren Gross explains, in national security situations, “the problem is that if people, in hindsight, believe that the risk was more foreseeable and still occurred, that might be interpreted to mean that not enough measures had been taken in order to prevent the harm from occurring in the first place”. Gross (n 7), p. 57.

<sup>38</sup> The term refers to reactive measures that overcorrect the last politicised and sensationalised intelligence failure, thus paving the way for flipside errors. Philip E Tetlock and Barbara A Mellers, ‘Intelligent Management of Intelligence Agencies: Beyond Accountability Ping-Pong’ (2011) 66 *American Psychologist* 542.

Behavioural approaches further help us understand the underlying interests and motives of states and their leaders on the international scene. In national security matters, altruistic and fairness considerations are invariably absent. Instead, states prioritise their own security over other goods and seem willing to sacrifice public goods and other states' security to protect their own.<sup>39</sup> This could well be explained by prospect theory (loss aversion).<sup>40</sup> Indeed, if states perceive attacks as a loss in their security and take their current or pre-attack status as the reference point, prospect theory predicts that they will be willing to take excessive risks to avoid future losses and will go to great lengths to protect their current security status. States would thus be expected to take an irredentist approach when feeling under threat or having suffered a 'loss' in national security, such as declaring a 'global war on terror'; sending troops in foreign states; and pursuing such war to sunk costs even after it has long proven counterproductive. National security is about protecting the security of the state and its institutions, and about alleviating the electorate's fear. The national interest is the only interest that matters.

Further, peer pressure and institutional frameworks such as the UN Security Council and NATO have increased the focus on national security after 9/11 by prioritising international cooperation to face the terrorist threat.<sup>41</sup> Counterterrorism cooperation, for instance, is self-interested: states cooperate because their interests coincide and because they need other states' capabilities to face a transnational threat. The transnational nature of the modern terrorist threat means that, to fight it, states need to act at both domestic and international levels. Whether merged or separate, responses to domestic and globalised threats depend on public support, cooperation, and willing informants, i.e. citizens and other states' intelligence communities. No state, even the most skilled and technologically equipped, can by itself cover all world zones and all sorts of threats. Hence, even 'intelligence superpowers' like the US are not self-sufficient in that respect, a fact that gives bargaining power and influence to its partners.

Through institutional frameworks, however, states are also subject to group biases. Research on groupthink shows that groups are vulnerable to several cognitive biases, which lead to in-group pressures towards conformity and cohesiveness, suboptimal performance, and a group-serving bias.<sup>42</sup> These biases are easily observed in the actions taken on the international scene in the wake of 9/11. Apart from the French opposition to the US intervention in Iraq in the UN Security

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<sup>39</sup> The numerous foreign interventions witnessed during the Cold War and since 9/11 are evidence of this tendency.

<sup>40</sup> Introduced by Kahneman and Tversky, prospect theory is a psychology-based utility theory that characterises decisions among risky alternatives with known probabilities. Prospect theory applies an S-shaped value function that assumes the value of zero at the reference point and is concave on the space of gains and convex on the space of losses. The S-shaped value function embeds loss aversion, according to which a gain generates a utility increase lower than the disutility caused by the same-sized loss. Daniel Kahneman and Amos Tversky, 'Prospect Theory: An Analysis of Decision under Risk' (1979) 47 *Econometrica* 263.

<sup>41</sup> See, UN Security Council Resolution 1373 (2001); and the invocation of the principle of collective self-defence under Article 5 of the North Atlantic Treaty on 2 October 2001, paving the way for the operation of the CIA-led rendition, detention and interrogation programme.

<sup>42</sup> Janis (n 11) identified eight symptoms that characterise the phenomenon of groupthink. See Rose McDermott, *Political Psychology in International Relations* (The University of Michigan Press 2004) 249–260 for a summary and discussion of later research; and Puvathingal and Hantula (n 8) 203 for a discussion in relation to intelligence analysis.



Council,<sup>43</sup> no explicit opposition to the US' 'global war on terror' could be witnessed from US allies. Rather, US allies supported most of its extra-legal operations,<sup>44</sup> and one can only assume that US President George W. Bush's framing of the choice as "[y]ou're either with us or against us"<sup>45</sup> did not do much to encourage dissent and mitigate these group biases.

Further, the framing of the terrorist threat as a 'global war' might also have reinforced the hawkish biases of elite decision-makers. Finally, the complete lack of interstate accountability witnessed in intelligence matters, despite egregious violations of both interstate obligations and human rights norms, can be interpreted as evidence that states are unwilling to retaliate and sanction other states when security is at stake. The sanctioning dilemma is thus at its peak.

## **B. Regulatory Implications**

These observations inform regulation in the international legal order. Whereas interstate forms of accountability are implausible, other forms of accountability<sup>46</sup> remain possible. In particular, mediated forms of accountability, commonly triggered by individual complaints before human rights courts and bodies and by states' reporting obligations, have increased exponentially following revelations about the CIA-led and NSA-led programmes.<sup>47</sup> For the first time, intelligence activities became the subject of international litigation, and their legality was thoroughly assessed.

At the same time, we witnessed a momentum towards a heightened legalism of intelligence activities, resting on a series of interlocking changes<sup>48</sup> that increased demands for, and possibilities of accountability. The evolving nature of intelligence activities after the Cold War, now targeting individuals more directly, and the parallel 'humanisation' of international law thus led individuals to have legitimate expectations that their rights would be respected. Further, the increase in intelligence leaks and scandals triggered a renewed interest for intelligence activities and affected

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<sup>43</sup> Address on Iraq, by Dominique de Villepin, French Minister of Foreign Affairs, at the UN Security Council. New-York, 14 February 2003.

<sup>44</sup> Estimates for the number of states implicated in the CIA-led rendition, detention and interrogation programme range between 44 to more than 65 in the most recent studies. 40 states, well beyond NATO membership of 18 at the time, also agreed to provide some or all of the broad permissions and protections decided by NATO allies on 4 October 2001. These measures proved crucial to the existence of the CIA's extraordinary rendition scheme. See Dick Marty, 'Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States' (Parliamentary Assembly of the Council of Europe 2007).

<sup>45</sup> Joint news conference with French President Jacques Chirac, 6 November 2001.

<sup>46</sup> I define international legal accountability as the process by which a state legally justifies its performance vis-à-vis other international actors, in which an assessment or judgement of that performance against international legal standards is rendered, and through which consequences can be imposed if the state fails to live up to applicable international legal standards. Duroy (n 4) 135.

<sup>47</sup> E.g. ECtHR, *Big Brother Watch and Others v. the United Kingdom* [GC] – Applications No 58170/13, 62322/14 and 24960/15, 25 May 2021; *Al-Nashiri v. Romania*, Application No. 33234/12, 31 May 2018; *Husayn (Abu Zubaydah) v. Poland*, Application No. 7511/13, 24 July 2014; *El-Masri v. The Former Yugoslav Republic of Macedonia*, Application No. 39639/09, 13 December 2012. UNCAT, *Agiza v. Sweden*, CAT/C/34/D/233/2003, 25 May 2005. CCPR, *Alzery v. Sweden*, Communication No. 1416/2005, CCPR/C/88/D/1416/2005, 10 November 2006. IACHR, *Khaled El-Masri v. United States*. Report 21/16. Petition 419-08. Report on Admissibility. OEA/Ser.L/V/II.157. Doc. 25. 15 April 2016.

<sup>48</sup> Ashley Deeks, 'Confronting and Adapting: Intelligence Agencies and International Law' (2016) 102 Virginia Law Review 599, 600–629.

agencies' legitimacy. Finally, a new pervading legalism<sup>49</sup> in intelligence communities accompanied these communities' renewed understanding that compliance with international law is increasingly necessary to be perceived as legitimate and to benefit from citizens' and foreign services' cooperation.<sup>50</sup>

This article argues that this increase in the likelihood of effective accountability, both before human rights courts and bodies and before the international legal order as a whole, affects what states perceive to be their interest in national security matters. The result is that the likelihood of effective accountability, a legal factor, now represents the most important variable to explain and determine whether a state will comply with international law in its intelligence activities.

Although states are self-interested in national security matters, actions by other actors of the international legal order may affect what states perceive to be their interest. This is mostly due to how states value their reputation. States can have a reputation for various things (e.g. complying with international law; respecting human rights; being a reliable treaty partner; siding with allies) and their reputation is mainly a matter of how other states perceive them. Although there are significant issues attached to efforts to assess the impact of reputation on state compliance,<sup>51</sup> and many biases and heuristics may impact how a state is perceived by other states,<sup>52</sup> reputation remains an important factor to explain compliance. In addition, it is sometimes affected in very concrete and visible ways, such as when a state is prevented from borrowing on international markets<sup>53</sup> or excluded from participating in international cooperative regimes or institutions.<sup>54</sup> In such cases, the costs of a negative reputation can be measured somewhat precisely. For reputation to be affected, however, other actors must attribute the state's behaviour to dispositional rather than situational factors.<sup>55</sup>

International courts and bodies produce information about non-compliant behaviour, either bringing such conduct to light or shaping the saliency, credibility, and framing of information for other actors of the international legal order.<sup>56</sup> In this sense, (quasi-)judicial decisions produce information that facilitates effective reputational deterrence. They also clarify what type of conduct would have constituted an appropriate (compliant) response to a situation of national security threat. From this perspective, state accountability sets a normative benchmark: the decision, in substance, explains that when facing situation *x*, states may not respond with *y*. If, in future instances, states still decide to face situations similar to *x* with response *y*, then other states are more likely to attribute this behaviour to dispositional factors since *y*'s unlawfulness and the existence of alternative courses

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<sup>49</sup> Margo Schlanger, 'Intelligence Legalism and the National Security Agency's Civil Liberties Gap' (2015) 6 Harv. Nat'l Sec. J. 112.

<sup>50</sup> Deeks (n 48) 600–629.

<sup>51</sup> See Rachel Brewster, 'Unpacking the State's Reputation' (2009) 50 Harvard International Law Journal 40.

<sup>52</sup> van Aaken (n 5) 479.

<sup>53</sup> See the degrading situation of Argentina between 2007 and 2013 following its refusal to comply with arbitral awards mandating it to reimburse foreign investors.

<sup>54</sup> On outcasting in international law, see Anne van Aaken, 'Experimental Insights for International Legal Theory' (2019) 30 European Journal of International Law 1237, 1257–1259; Oona Hathaway and Scott J Shapiro, 'Outcasting: Enforcement in Domestic and International Law' [2011] Yale Law Journal 98.

<sup>55</sup> van Aaken (n 5) 477.

<sup>56</sup> Roy Shapira, *Law and Reputation: How the Legal System Shapes Behavior by Producing Information* (1st edn, Cambridge University Press 2020) 35.

of action have been made clear before. State accountability could therefore first be conceived of as an informational device for states, which can adjust their perception of other states' behaviour accordingly, relying on the benchmark set by the decision. Additionally, accountability could be conceived of as a tool directly affecting the state's reputation through the persuasive force of the judgments and decisions.

This dual role of state accountability means that the direct, reputational, and indirect sanctions imposed by competent accountability forums can increase the direct, reputational, and indirect costs of violations, making it less interesting for states to violate international law when responding to national security threats. The reputational threat induced by state accountability could thus function as a deterring factor. Generally, actors will be deterred from breaching the law when the legal penalty they would receive for a breach, multiplied by the likelihood of swift detection and conviction, outweighs the gain.<sup>57</sup> It is therefore the *perception* of the risk of accountability, more than the actual risk, that deters actors from breaching the law.<sup>58</sup> Deterrence is only one of many tools that a regulator (here, the international legal order) possesses, and the success of a deterrence strategy depends largely upon the state's perception of the costs. In intelligence matters, this variable<sup>59</sup> is a function of the value that the state bestows upon relevant aspects of its reputation and (continued) cooperation with other states.

In intelligence matters, state accountability before competent human rights courts and bodies also has a trickle-down effect due to the necessity to cooperate with other states. Ashley Deeks conceptualised this as 'mechanisms of peer constraints' between intelligence communities.<sup>60</sup> Deeks describes the phenomenon whereby constraints on one state's intelligence community, whatever their nature or origin, also constrain peer intelligence communities because of the willingness or necessity of continued cooperation. Such a phenomenon can be observed through the effects of accountability for wrongful acts resulting from intelligence activities, at least in democratic states. Hence, a state facing a decision that its surveillance legislation breaches a human rights treaty will (ideally) alter such legislation. To avoid being held to account for its intelligence partners' acts, it should then require that the information it receives from other states respects similar standards; and that the information it shares with them be treated respecting the caveats imposed by its domestic legislation.<sup>61</sup> The standards imposed by the accountability forum will therefore 'trickle down' to the state's intelligence partners due to their willingness to keep the flow of information running. In addition, states subject to the jurisdiction of the same human rights body may preventively apply equivalent standards to their domestic regulation of surveillance, thereby triggering a similar trickle-

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<sup>57</sup> Christine Parker and Vibeke Nielsen, 'Compliance: 14 Questions' (2017) 227 in Peter Drahos (ed), *Regulatory Theory* (ANU Press 2017).

<sup>58</sup> Parker and Nielsen (n 57) 228.

<sup>59</sup> The likelihood of effective accountability is measured in the model by adding together the state's positive reputation (R) and the costs of non-compliance (Cnc). See below Part III.

<sup>60</sup> Ashley Deeks, 'Intelligence Services, Peer Constraints, and the Law' in Zachary K Goldman, Samuel J Rascoff and Jane Harman (eds), *Global Intelligence Oversight* (Oxford University Press 2016).

<sup>61</sup> CJEU, Case C-311/18 *Data Protection Commissioner v Facebook Ireland Ltd and Maximilian Schrems* ('Schrems II'), Grand Chamber Judgment, 16 July 2020, para 105. But see ECtHR, *Big Brother Watch and Others v. the United Kingdom* [GC], supra n 47, para 362; and *Centrum för rättvisa v. Sweden* [GC], Application No 35252/08, 25 May 2021, para 276: "This does not necessarily mean that the receiving State must have comparable protection to that of the transferring State; nor does it necessarily require that an assurance is given prior to every transfer".

down effect with their own intelligence partners. The need for cooperation therefore creates an accountability web, whereby states are encouraged to comply with the standards imposed on their intelligence partners by accountability forums that they may not even be subject to.

Intelligence decision-makers adopt responses to national security threats based on a rational choice approach, balancing the costs and benefits of potential strategies.<sup>62</sup> However, the recent instances of state accountability before human rights courts and bodies, coupled with the increased publicity of agencies' actions and individuals' expectations that their rights be respected,<sup>63</sup> have changed the costs, payoffs, and incentives. Analysis of these changes suggests that, if the goal is to effectively respond to national security threats (as opposed to, for instance, win an upcoming election), the increase of state accountability for extra-legal intelligence activities has made it more interesting – and thus *rational* – for states to comply with international law. Compliance is therefore in states' interest not only because it leads to more effective responses to national security threats but also, and crucially so for decision-makers, because of the enhanced risk of being held to account. Indeed, self-interest and reputational concerns impose that states account for the risk of accountability in their decision-making. By bringing intelligence activities back into the realm of the law, and by making them public and open to scrutiny, state accountability changes what states perceive to be their interest. It acts both as a deterrent against extra-legal measures and as an incentive for states to comply with international law.

### **III. A COMPLIANCE-BASED MODEL OF EXECUTIVE INTELLIGENCE DECISION-MAKING**

Because their rationality is bounded, intelligence decision-makers do not consider only objective costs and benefits when making decisions. In consequence, although decision-makers follow a rational choice approach, intelligence decision-making does not fit within a simple rational choice model. Such model therefore constitutes a poor explanatory tool for states' decisions. To represent executive decision-making in intelligence matters more accurately, this part expands the rational choice model to account for the particularities of national security intelligence, behavioural insights, and recent developments in the international legal order.

The model I propose aims to account for the role and weight of the factors influencing states' decision-making in intelligence matters. It works as a *bounded* rational choice equation, integrating not only objective factors of risks and benefits, but also the state's subjective perception of the threat, decision-makers' personal interests; their perceptions of the state's values and identity and the weight they bestow upon these (positive) aspects of the state's reputation; and other domestic considerations (e.g. oversight, elections, public opinion). The model accounts for the dependencies of states in their responses to national security threats by factoring in the necessities of cooperation and the risk of alienating intelligence partners and sources. The model further assumes that the state will behave in a self-interested manner, meaning that the result of their decision-making process

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<sup>62</sup> As an example of this reasoning in practice, see the United Kingdom's balancing act regarding torture-tainted intelligence received from the United States during the war on terror: the unlikelihood (as assessed then) of any sanctions meant that MI5 "assessed that the legal and reputational risks were low and the intelligence it was receiving was highly valuable and therefore worth the risk". Intelligence and Security Committee of Parliament, 'Detainee Mistreatment and Rendition: 2001-2010' (2018), para 129.

<sup>63</sup> This interaction effect is reflected in the model by the inclusion of the expectation of publicity (P) on the numerator line together with the likelihood of effective accountability (R+Cnc). See below Part III.

will reflect what they perceive to be in their best interest. In this sense, the model is not only a descriptive and explanatory tool, identifying the factors at play in decision-making, but it also possesses some predictive power. Indeed, although it is beyond the scope of this article to do so, the model can also be applied *ex ante* to determine whether it would be in a state's interest to go forward with a specific intelligence activity at a given date, thus producing a score of expected compliance for the future.

The model aims to represent executive decision-making at the state level, integrating behavioural insights within the representation of the last stage of decision-making within the state, here called 'executive decision-making'. The unit of analysis therefore becomes the state, although somewhat fictionally. Two main reasons justify this choice. First, the decision at stake concerns an intelligence activity which, if adopted, would engage the responsibility of the state on the international level. This means that regardless of the actual level of decision-making within the state, the wrongful act will be attributed to it under the law of state responsibility<sup>64</sup> and the state may be held to account for it. Second, this last level or stage of decision-making, regardless of whether the decision is in fact made at the highest possible level in the state apparatus, is the stage where all the biases and heuristics identified in Part II coalesce. Biases in threat assessment, in the identification and framing of options to respond to the threat, in the relationship between various domestic actors, and in interstate cooperation all add up and bundle together in the ultimate decision-making process by elite decision-makers.

The determination of the expectation of a given state's compliance (C) regarding an intelligence activity in breach of its international obligations is made according to an operation involving the following interrelated elements: the state's reputation (R [positive aspects] and R\* [negative aspects]); the costs of compliance with international law (Cc); the costs of non-compliance with international law (Cnc); the benefits of non-compliance with international law (Bnc); and the foreseeable expectation of publicity of the activity (P). These elements are the result of a prior assessment of intelligence-specific factors, as explained in Table 1, and represent the considerations impacting a boundedly rational state's decision. The model is better represented by the following equation:

$$C = \frac{R + Cnc + P}{R * + Cc + Bnc}$$

In discursive form, the equation reads as follows: the **expectation of compliance** is equal to **[the state's positive reputation plus the costs of non-compliance plus the expectation of publicity]** divided by **[the state's negative reputation plus the costs of compliance plus the benefits of non-compliance]**.

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<sup>64</sup> International Law Commission, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, Part One, Chapter II.

Table 1 - Model

Element	Meaning	Factors and Formula	Scale <sup>65</sup>	Possible score
<b>R</b>	Positive Reputation	Human rights record and reputation × Quality of domestic oversight of intelligence activities	1-4 × 1-4	1-16
<b>R*</b>	Negative Reputation <sup>66</sup>	16 – R	NA	0-15
<b>Cc</b>	Costs of Compliance	Domestic costs × Intelligence losses	1-4 × 1-4	1-16
<b>Cnc</b>	Costs of Non-Compliance	Strength of accountability network <sup>67</sup> × Intelligence reputation and human rights reputation losses	1-4 × 1-4	1-16
<b>Bnc</b>	Benefits of Non-Compliance	Productivity of measure × Other intelligence and domestic gains	1-4 × 1-4	1-16
<b>P</b>	Expectation of publicity	Probability as assessed by decision-maker: null (1) – long-term (2) – medium-term (3) – short-term (4)	1-4	1-4

Using an equation allows for universal application of the model, to all states and all intelligence activities in breach of international law, by researchers and intelligence decision-makers alike. The scoring process required for the model is a qualitative exercise that does not purport to be perfectly objective. The model thus represents an attempt to quantify qualitative elements. This semi-quantitative method relies on a qualitative scale (see appendix), defined for each element and factor (part of an element). The sensitivity of the scale permits relative confidence in the result despite the possibility of small variations in the scores attributed to each factor by different users.

To use the model, one must score each factor from one to four assessing the criteria listed in Table 2 (a full scoring table with a scale is provided in appendix) and run the equation on an intelligence activity in breach of international law. The result provides an indicative score of

<sup>65</sup> For all factors, the scale goes from 1 (lowest) to 4 (highest). See appendix for additional details on the scoring process.

<sup>66</sup> The state's 'negative reputation' constitutes the counterpart of the positive aspects of the state's reputation. The addition of positive and negative aspects should always be equal to 16. Negative aspects tend to reinforce the weight of extra-legal domestic considerations and are included in the denominator side of the formula, whereas positive aspects increase the weight given to considerations of international legality and figure in the numerator side of the formula.

<sup>67</sup> 'Accountability network' refers here to all competent supra-national mechanisms and states capable of holding the state to account for a breach of its international obligations. It therefore represents the *potential* for transnational enforcement, not actual enforcement.

compliance (C). It represents the likelihood that any given state behaving in what it believes to be its best interest will either conduct the activity in breach of international law or decide instead to comply with its international obligations. If the result (C) is inferior to 1, then it is *not* in the state's interest to comply with international law. Conversely, if C is superior to 1, it is in the state's interest to comply with international law. Part IV provides an illustration of such functioning.

*Table 2 – Factors*

<b>Factor</b>	<b>What is assessed<sup>68</sup></b>
<b>Human Rights Record and Reputation</b>	State's membership of human rights organisations; ratification of main treaties; engagement with procedures; persistence of systemic human rights issues; outward appearance of respect for human rights obligations
<b>Quality of Domestic Oversight of Intelligence Activities</b>	Existing domestic structure for oversight; actual powers and competences
<b>Domestic Costs</b>	Likely domestic backlash failing adoption of the envisaged unlawful measure
<b>Intelligence Losses</b>	Losses incurred if the state does not adopt the measure. E.g., disruption in existing intelligence sharing framework
<b>Strength of Accountability Network</b>	Combined powers and competences of all competent accountability mechanisms (other states and international institutions)
<b>Intelligence Reputation and Human Rights Losses</b>	Likely harm to domestic and international reputation as a reliable intelligence partner if the unlawful measure is adopted
<b>Productivity of Measure</b>	Financial and human (personnel) costs of the measure compared to its intelligence benefits
<b>Other Intelligence and Domestic Gains</b>	Increased security (powers, missions, favourable opinion ratings, etc.) of governmental institutions
<b>Expectation of Publicity</b>	Probability, as assessed by decision-maker, that the measure will become public: never, at short, medium, or long term

The equation's structure exemplifies the balancing of international legality against domestic considerations, representing the tension between international law requirements and perceptions of what the national interest requires. This balancing exercise is informed by the decision-makers' own interests and the biases in the formulation and assessment of threats present at various stages of decision-making. Variables *R* (*positive reputation*) and *Cnc* (*costs of non-compliance*) taken together represent the likelihood of effective accountability, accounting for all possibilities of domestic and transnational enforcement of international legality. The higher the score for (*R+Cnc*), the higher the likelihood that the state will be effectively held to account for a breach of its international obligations, directly or through collateral consequences. In contrast, domestic

<sup>68</sup> See appendix for a full scoring table.

considerations are accounted for through variables  $R^*$  (*negative reputation*),  $Cc$  (*costs of compliance - domestic costs*), and  $Bnc$  (*benefits of non-compliance - other intelligence and domestic gains*). The higher the score on the denominator line of the formula, the more likely it is that the state (as represented by the responsible decision-maker) will prefer to forego its international obligations in favour of domestic considerations. Finally, variable  $P$  (*expectation of publicity*) and, to a lesser extent,  $Cc$  (*costs of compliance - intelligence losses*) and  $Bnc$  (*benefits of non-compliance - productivity of measure*), are activity-dependent variables that reinforce the likelihood of effective accountability ( $P$ ) or the weight to be given to domestic considerations ( $Cc$  and  $Bnc$ ).

#### IV. HARNESSING THE MODEL: A COMPARATIVE CASE STUDY

To demonstrate the model's functioning in concrete situations and illustrate the explanatory role of the likelihood of effective accountability, I conduct a comparative analysis using a 'most-similar cases' case selection method.<sup>69</sup> Known in social sciences as 'the comparative method', a most-similar system design is a standard case selection principle for inference-oriented, controlled comparison in qualitative, small-N studies.<sup>70</sup> A most-similar research design requires that comparable cases be selected so as to hold non-key variables constant while isolating the explanatory power of the key independent variable with regard to the dependent variable (the phenomenon needing explanation). Here, the dependent variable is state compliance or non-compliance in intelligence matters. This method allows me to illustrate the explanatory power of the likelihood of effective accountability, as an independent variable, and to demonstrate the model's utility as a representation of intelligence decision-making.

For this purpose, I use a single unlawful measure (i.e. intelligence activity) as a common denominator: targeted assassination on foreign territory in the absence of a genuine armed conflict involving the state conducting the assassination.<sup>71</sup> This commonly takes the form of a drone strike. The first reason for this choice is practical: targeted assassinations are a semi-public intelligence activity because they leave visible traces. Their authors can normally be identified relatively easily, even if the responsible state neither officially confirms nor denies its participation. The activity itself (the strike) constitutes a covert action, that is, a secret activity intended to influence political, economic, or military conditions abroad.<sup>72</sup> Covert actions are generally considered to be intelligence activities for two main reasons: institutionally, they are often performed by intelligence agencies (civil or military);<sup>73</sup> and substantively, they are secret state actions. They differ from traditional

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<sup>69</sup> John Gerring, 'Case Selection for Case-Study Analysis: Qualitative and Quantitative Techniques' in Janet M Box-Steffensmeier, Henry E Brady and David Collier (eds), *The Oxford Handbook of Political Methodology* (Oxford University Press 2008).

<sup>70</sup> Ran Hirschl, 'The Question of Case Selection in Comparative Constitutional Law' (2005) 53 *The American Journal of Comparative Law* 125, 133.

<sup>71</sup> Targeted assassinations are not necessarily lawful in times of armed conflict but, for simplicity purposes, situations of armed conflict have been excluded from this analysis.

<sup>72</sup> See the United States' official definition in: National Security Act of 1947 (50 U.S.C. 3093), Section 503 (e).

<sup>73</sup> In the United States, Executive Order 12333 (July 2008) thus gives exclusive authorisation to the CIA to "conduct covert action activities approved by the President"; but with regard to targeted killings, joint operations with the military are increasingly common. See 'Distinguishing CIA-Led from Military-Led Targeted Killings' (Lawfare, 28 January 2013) <<https://www.lawfareblog.com/distinguishing-cia-led-military-led-targeted-killings>> accessed 30 April 2021.



intelligence collection in that they seek to *influence* a situation abroad, rather than (only) acquire information, but are nonetheless an important part of agencies' work.

Second, targeted assassinations on foreign territory are unequivocally an internationally wrongful act in the absence of a genuine armed conflict. As lethal and territorially intrusive covert actions, peacetime targeted assassinations are in direct breach of the principles of non-intervention and territorial sovereignty.<sup>74</sup> They further constitute a gross violation of the victims' right to life under international human rights law (IHRL), independently of whether relevant human rights conventions apply *ratione loci*.<sup>75</sup> As explained by the special rapporteur on extrajudicial, summary or arbitrary executions, to be lawful, a drone strike must satisfy the legal requirements under all applicable international legal regimes, in this case *jus ad bellum* and IHRL.<sup>76</sup> A lawful targeted assassination on foreign territory in the absence of a genuine armed conflict is thus extremely unlikely.

For this 'most-similar cases' comparative analysis, France and the United States constitute matching cases. Both are considered democratic 'free' states according to Freedom House 2020 scores<sup>77</sup> (scoring respectively 90 and 86 out of 100) and are permanent members of the UN Security Council. Both states are engaged in foreign military interventions abroad in the fight against terrorism; have been conducting targeted strikes in the Middle East as part of the anti-ISIS coalition; and have been facing acute national security (mostly terrorist) threats since 9/11. Looking at two high-profile strikes, each against the person considered by the relevant administration to pose the most acute threat to national security at the time, measure-dependent variables are again similar. There was no expected gain in intelligence; the electorate expected the administration to act on the threat, incurring costs if it did not and reaping domestic benefits if it did; and immediate publicity of the strike was inevitable. Both states are therefore similar in all relevant aspects but for the likelihood of effective accountability (the variable of interest). Yet, whereas the US went ahead, France decided not to strike. These opposite outcomes constitute the dependent variable, the puzzle that the case-study seeks to explain.

Table 3 summarises the case-study's basic design, which will be further refined by applying the model to these two contemplated strikes.

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<sup>74</sup> Affirmed in Article 2 of the UN Charter, the precise content of these principles has been developed first in the 'Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations', adopted by UN General Assembly Resolution 2625 (XXV) of 24 October 1970; and later in UN General Assembly, Resolution 36/103, 'Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States', U.N. Doc A/36/761 (1981).

<sup>75</sup> Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions Agnès Callamard: targeted killings through armed drones and the case of Iranian General Quassem Soleimani, A/HRC/44/38, 29 June 2020, para 30.

<sup>76</sup> *ibid.*

<sup>77</sup> Notwithstanding the critiques on their methodology, Freedom House scores are useful to illustrate the difference between notions of domestic democracy, where France and the US score similarly, and of respect for the international rule of law, where they score very differently. The disparity in scoring underlines the importance of taking as main variable the potential for effective accountability rather than the state of democracy and public liberties.

Table 3 - Case Study Design

	Democracy	P5	Conducts targeted strikes	High national security threat	High-stake strike	Gain in intelligence	Pressure from electorate	Likelihood of effective accountability	Strike
France	YES	YES	YES	YES	YES	NO	YES	HIGH	NO
US	YES	YES	YES	YES	YES	NO	YES	LOW	YES

This case-study serves a dual purpose. First, I seek to illustrate the potential of the model as a representation of executive decision-making in intelligence matters, showing how its various elements interact in reaching the state's decision to, in the present case, comply or strike. Second, I seek to show that the opposite outcomes in these two cases are due to a stark difference in the risk of being effectively held to account, represented by variable ( $R+Cnc$ ), other potential explanatory factors being similar for both states. In this way, I illustrate the explanatory and potential predictive power of this variable. In other words, the case-study constitutes a small-N test of the claim at the heart of the article's argument, namely, that the higher the result of ( $R+Cnc$ ), the higher the expectation of state compliance, all other factors being equal.

The two strikes under scrutiny are the following:

- A. France – Non-adopted plan to strike Abdelhamid Abaaoud (Belgian-Moroccan citizen), in Raqqa, Syria, in late summer 2015 – Score ( $R+Cnc$ ): 14.
- B. The United States of America – Assassination of Major General Qasem Soleimani (Iranian-Iraqi citizen), in Baghdad, Iraq, on 3 January 2020 – Score ( $R+Cnc$ ): 6.

#### A. France

In late summer 2015, French intelligence proposed that Abdelhamid Abaaoud, the Belgian-Moroccan Islamic State official linked to a failed attack on a French church and to the Thalys train attack in August 2015, be targeted for assassination.<sup>78</sup> Former French President François Hollande divulged this classified information during his mandate. Without explicitly naming Abaaoud, Hollande told journalists Davet and Lhomme on 4 September 2015 that he knew of a high-rise building in Raqqa, which housed “a person who trains jihadists coming from abroad, either as fighters there, or to return to Europe and strike their home country. We think we know the place. And there's a Belgian-Moroccan who is running it”. Unbeknownst to the French, however, Abaaoud had already returned to Europe. In any event, “[w]e didn't strike the high-rise in Raqqa”, Hollande told the journalists on 6 November 2015, “there are civilians around. We've made a rule for ourselves not to strike where there's a risk for the civilian population”.<sup>79</sup> Seven days later, Abaaoud led the attacks that killed 129 people in Paris and Saint-Denis. He was shot dead by French security forces on 18 November 2015.

<sup>78</sup> Pierre Alonso and Willy Le Devin, ‘Comment la DGSE traquait Abaaoud de longue date’ (Libération, 12 January 2017) <[https://www.liberation.fr/france/2017/01/12/comment-la-dgse-traquait-abaaoud-de-longue-date\\_1541034/](https://www.liberation.fr/france/2017/01/12/comment-la-dgse-traquait-abaaoud-de-longue-date_1541034/)> accessed 9 February 2021.

<sup>79</sup> Alonso and Le Devin (n 78). Translated from French.

France had been part of the US-led coalition bombarding ISIS targets in Iraq since September 2014. According to French and US figures from September 2015, France had carried out 215 of the nearly 4,500 strikes there but limited its airstrikes to Iraqi territory. In the summer of 2015, therefore, France was not in an armed conflict with Syria. The strike under scrutiny would thus have constituted a violation of territorial sovereignty and an unlawful use of force. In the absence of a genuine armed conflict, the killing of civilians through an aerial strike could be qualified as a crime against humanity, and IHRL would also be applicable. Besides, civilian casualties would likely have harmed France's reputation internationally and discredited the administration's counter-terrorism strategy domestically. Hence, French intelligence correctly assessed that striking the building in Raqqa would be unlawful *and* that it would not be in its interest to strike. Applying the model at the estimated time of decision-making, September 2015, confirms this assessment:

*R (positive reputation)*: France is a member of all relevant universal and regional human rights organisations but does not pride itself on a perfect compliance record, and systemic human rights issues persist in the country (human rights record and reputation: **3**). Its domestic system for the oversight of intelligence activities has historically been poorly endowed, but a law promulgated on 24 July 2015<sup>80</sup> gave legal status to intelligence activities and created a mixed (parliamentary and judicial) commission of oversight, the CNCTR.<sup>81</sup> However, the CNCTR started functioning on 3 October 2015, after the estimated date of decision-making, and gained some of its powers even later. Therefore, in September 2015, the domestic system of oversight was reliant on disparate legal provisions and a rather powerless oversight body: the CNCIS<sup>82</sup> (quality of domestic oversight of intelligence activities: **2**).

*Cc (costs of compliance)*: Mid-2015, the French government was under intense political pressure to provide a strong response to the threat posed by ISIS and the high number of French 'foreign fighters' who had left to join its ranks. The acute terrorist threat and the expectation that security should be provided through all available means thus raised the costs of compliance (domestic costs: **3**). No loss in intelligence could be expected from not going forward with the strike, as Abaaoud's assassination was not a precondition to maintain any intelligence programme or cooperation (intelligence losses: **1**).

*Cnc (costs of non-compliance)*: France's network of accountability mechanisms is strong owing to its acceptance of all optional mechanisms and its membership of the European Union, Council of Europe, and International Criminal Court (strength of accountability network: **4**). Were the measure adopted, several states would likely review the terms of intelligence sharing with France and attach human rights safeguards to the information they share to avoid being complicit in the (unlawful) killing of civilians. However, it is unlikely that they would stop all intelligence sharing in the counter-terrorism context (intelligence and human rights reputation losses: **2**).

*Bnc (benefits of non-compliance)*: By nature, assassination does not produce intelligence (productivity of measure: **1**). By going forward with the strike, the Hollande administration would show it is doing 'everything' to fight the terrorist threat, thus improving the security of governmental institutions. But the killing of civilians would likely trigger an important domestic backlash, tempering these benefits (other intelligence and domestic gains: **2**).

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<sup>80</sup> LOI n° 2015-912 du 24 juillet 2015 relative au renseignement.

<sup>81</sup> Commission nationale de contrôle des techniques de renseignement.

<sup>82</sup> Commission nationale de contrôle des interceptions de sécurité.

*P (expectation of publicity):* Short-term publicity is inevitable (4).

*Table 4 - France*

	Meaning	Factors	Score	Total
<b>R</b>	Positive Reputation	Human rights record and reputation × Quality of domestic oversight of intelligence activities	3 × 2	6
<b>R*</b>	Negative Reputation	16 – R	10	10
<b>Cc</b>	Costs of Compliance	Domestic costs × Intelligence losses	3 × 1	3
<b>Cnc</b>	Costs of Non-Compliance	Strength of accountability network × Intelligence and human rights reputation losses	4 × 2	8
<b>Bnc</b>	Benefits of Non-Compliance	Productivity of measure × Other intelligence and domestic gains	1 × 2	2
<b>P</b>	Expectation of publicity	Probability as assessed by decision-maker: null (1) – long-term (2) – medium-term (3) – short-term (4)	4	4

$$C = \frac{R + Cnc + P}{R^* + Cc + Bnc} = \frac{6 + 8 + 4}{10 + 3 + 2} = 1,2$$

With a score of 1,2, France was expected to comply with international law, i.e. to renounce striking Abaaoud.

## **B. The United States of America**

On 3 January 2020, a United States' drone strike near Baghdad International Airport targeted and killed Iranian major general Qasem Soleimani of the Islamic Revolutionary Guard Corps.<sup>83</sup> Soleimani was an Iranian-Iraqi citizen, commander of the Quds Force, and was considered the second most powerful person in Iran. Nine others were killed alongside Soleimani. Among them were five Iraqi nationals, including the leader and several members of Kata'ib Hezbollah, an Iraqi Shia paramilitary group supported by Iran.

The US gave shifting and contradictory rationales for killing Soleimani. It first claimed that the strike aimed to stop an "imminent attack",<sup>84</sup> but Secretary of State Mike Pompeo later corrected:

<sup>83</sup> See Jean Galbraith, 'U.S. Drone Strike in Iraq Kills Iranian Military Leader Qasem Soleimani' (2020) 114 American Journal of International Law 313 for a factual summary.

<sup>84</sup> Statement by the Department of Defense, 2 January 2020, <<https://defense.gov/Newsroom/releases/Release/Article/2049534/statement-by-the-department-of-defense/>>.

“We don’t know precisely when and we don’t know precisely where”.<sup>85</sup> Iran qualified the attack as an act of “state terrorism” while Iraq affirmed that the attack undermined its national sovereignty, was a breach of its agreement with the US, and constituted an act of aggression.<sup>86</sup> The Trump administration has not articulated any legal rationale for using force in Iraqi territory and against the five Iraqis, raising additional questions about the strike’s legality under *jus ad bellum*. Further, the evolving legal rationales for targeting Soleimani raise serious questions about what role, if any, international law played in President Trump’s decision.<sup>87</sup>

Indeed, according to the Washington Post of 4 January 2020, Trump approved the strike against Soleimani to avoid appearing weak amidst the ongoing Persian Gulf crisis.<sup>88</sup> Trump reportedly told associates after the strike that he was motivated to strike Soleimani for domestic political gain, particularly to sway Republican Senators to support him in his upcoming Senate impeachment trial.<sup>89</sup> The New York Times of 4 January 2020 thus reports that Trump had rejected the option to target Soleimani on 28 December 2019, but changed his mind after being angered by television news reports of 31 December showing the US embassy in Baghdad under attack by Iranian-backed protesters. By late 2 January, Trump had finalised his decision to go for the most extreme option his advisers had provided him, which reportedly “stunned” top Pentagon officials.<sup>90</sup> The Times also cites unnamed US officials as saying that the intelligence regarding Soleimani’s alleged plot against the US was “thin” and that the Ayatollah had not approved any operation for Soleimani to carry out.<sup>91</sup>

The strike was unequivocally internationally wrongful on multiple grounds, among them the prohibition on the use of force (UN Charter, Article 2(4)), territorial sovereignty, the principle of non-intervention, and IHRL.<sup>92</sup> Applying the model however shows that, although the strike was not necessarily in the United States’ interest, it was clearly in the interest of the Trump administration.

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<sup>85</sup> Real Clear Politics, ‘Pompeo: Attacks From Iran Were “Imminent” But “We Don’t Know Precisely When”’, 10 January 2020,

<[https://www.realclearpolitics.com/video/2020/01/10/pompeo\\_attacks\\_from\\_iran\\_were\\_imminent\\_but\\_we\\_dont\\_know\\_precisely\\_when.html](https://www.realclearpolitics.com/video/2020/01/10/pompeo_attacks_from_iran_were_imminent_but_we_dont_know_precisely_when.html)>.

<sup>86</sup> This assessment is confirmed by Callamard (n 75), Annex, para 80. For a list of states’ reactions to the strike, see ‘Compilation of States’ Reactions to U.S. and Iranian Uses of Force in Iraq in January 2020’ (Just Security, 22 January 2020) <<https://www.justsecurity.org/68173/compilation-of-states-reactions-to-u-s-and-iranian-uses-of-force-in-iraq-in-january-2020/>> accessed 9 April 2020.

<sup>87</sup> For a legal analysis of various legal arguments put forward, see Olivier Corten and others, ‘L’exécution de Quassem Soleimani et Ses Suites: Aspects de Jus Contra Bellum et de Jus in Bello’ (2020) 1 *Revue Générale de Droit International Public* 41.

<sup>88</sup> Missy Ryan and others, ‘How Trump Decided to Kill a Top Iranian General’ *Washington Post* (4 January 2020) <[https://www.washingtonpost.com/national-security/how-trump-decided-to-kill-a-top-iranian-general/2020/01/03/77ce3cc4-2e62-11ea-bcd4-24597950008f\\_story.html](https://www.washingtonpost.com/national-security/how-trump-decided-to-kill-a-top-iranian-general/2020/01/03/77ce3cc4-2e62-11ea-bcd4-24597950008f_story.html)> accessed 4 March 2021.

<sup>89</sup> Michael Bender and others, ‘Trump’s New National Security Team Made Fast Work of Iran Strike’ *Wall Street Journal* (10 January 2020) <<https://www.wsj.com/articles/trumps-new-national-security-team-made-fast-work-of-iran-strike-11578619195>> accessed 4 March 2021.

<sup>90</sup> Helene Cooper and others, ‘As Tensions With Iran Escalated, Trump Opted for Most Extreme Measure’ *The New York Times* (5 January 2020) <<https://www.nytimes.com/2020/01/04/us/politics/trump-suleimani.html>> accessed 4 March 2021.

<sup>91</sup> Cooper and others (n 90).

<sup>92</sup> Callamard (n 75), Annex.

Here, acting in his own and his administration's interest meant prioritising domestic considerations to the detriment of international legality, geopolitical stability, and long-term national security.

*R (positive reputation)*: The United States has ratified five of the 18 main universal human rights treaties and is a member of the OAS but without having ratified the Inter-American Convention on Human Rights. It considers itself bound by the IHRL corpus only to the extent that it corresponds to its constitutional rights, and only minimally engages with treaty bodies (human rights record and reputation: **2**). The existing domestic system for the oversight of intelligence activities, composed of various executive and legislative bodies, has important theoretical powers. However, it lacks formal independence, and its legitimacy is constantly being undermined by the executive branch and intelligence agencies, preventing effective oversight. The same effect is achieved in the judicial sphere by overreaching doctrines of state secrecy (quality of domestic oversight of intelligence activities: **2**).

*Cc (costs of compliance)*: The Trump administration would likely have faced only a limited domestic backlash for not responding strongly to the Iranian-backed attacks on the US embassy in Baghdad. A less extreme measure would thus have sufficed to prevent it (domestic costs: **2**). The strike was not necessary to prevent any intelligence losses (intelligence losses: **1**).

*Cnc (costs of non-compliance)*: The US' accountability network is weak overall, owing to the US' hegemonic position in the international legal order and to its lack of acceptance of any optional and individual complaint mechanism (strength of accountability network: **1**). The Trump administration could reasonably expect that some states, especially in the Middle-East, would review the terms of intelligence cooperation after the strike to avoid jeopardising their relations with Iran and to avoid being complicit in further unlawful actions of the type. It is also likely that some states would impose additional human rights safeguards on the intelligence they share with the US. However, the US' 'superpower' position in intelligence matters makes it unlikely that any state – even Iraq – would completely stop cooperating with the US (intelligence and human rights reputation losses: **2**).

*Bnc (benefits of non-compliance)*: By nature, targeted assassination does not produce any reliable intelligence (productivity of measure: **1**). However, the domestic benefits to be derived by the Trump administration were obvious – they constituted the very purpose of the strike – and the strike itself was a powerful reassertion of US strength against Iran. This is despite the risks of further escalation and the danger imposed on US troops stationed in Iraq (other intelligence and domestic gains: **4**).

*P (expectation of publicity)*: By nature, the strike was to be immediately public (expectation of publicity: **4**).

Table 5 - United States

	Meaning	Factors	Score	Total
<b>R</b>	Positive Reputation	Human rights record and reputation × Quality of domestic oversight of intelligence activities	2 × 2	4
<b>R*</b>	Negative Reputation	16 – R	12	12
<b>Cc</b>	Costs of Compliance	Domestic costs × Intelligence losses	2 × 1	2
<b>Cnc</b>	Costs of Non-Compliance	Strength of accountability network × Intelligence and human rights reputation losses	1 × 2	2
<b>Bnc</b>	Benefits of Non-Compliance	Productivity of measure × Other intelligence and domestic gains	1 × 4	4
<b>P</b>	Expectation of publicity	Probability as assessed by decision-maker: null (1) – long-term (2) – medium-term (3) – short-term (4)	4	4

$$C = \frac{R + Cnc + P}{R * + Cc + Bnc} = \frac{4 + 2 + 4}{12 + 2 + 4} = 0,55$$

With a score of 0,55, the US was expected not to comply with international law, i.e. it was expected to strike.

### C. Comparative Analysis

For a similar measure, contemplating a targeted strike against the person considered by the administration to pose the highest threat to their national security at the time, the US obtains a score (0,55) opposite to that of France (1,2), with 1 being the threshold for expected compliance. France was expected to comply while the US was expected to strike. The model helps explain why this is indeed what happened, and how this may have been foreseen had the model been applied pre-emptively on the dates of decision-making.

The first observation is that the strikes score similarly on all activity-specific factors. The difference in the final score (C) thus cannot be explained by the nature of the strikes considered. Further, if for simplicity purposes we code factors dichotomously as high (3 and 4) or low (1 and 2), both states get identical ratings (high or low) on all factors but four: *Human rights record and reputation (R)*; *Domestic costs (Cc)*; *Strength of accountability network (Cnc)*; *Other intelligence and domestic gains (Bnc)*. These factors, pertaining to international costs and domestic costs and benefits, should therefore be considered relevant to explain the difference of result.

This finding highlights the complex interplay of international and domestic considerations. This is especially striking for the US, which had, in absolute, equal losses and gains to make with

the strike. However, the gains and losses were situated on different scales: international losses against domestic gains. Hence, prioritising domestic considerations led to the decision to strike. In contrast, France had a lot to lose internationally, and relatively less to gain domestically. The high risk of accountability thus acted as a pull towards compliance despite the (relatively high) domestic costs associated with inaction.

The low score obtained by the US on variable ( $R+Cnc$ ) is responsible for the Trump administration's (correct) determination that they had more to gain than lose in moving forward with the strike, i.e. the strike was in their interest. Intelligence officers' framing of options was designed to nudge President Trump towards their preferred, reasonable, course of action.<sup>93</sup> Yet, Trump's own interests and biases led him to pick the most extreme option (hence "stunning" Pentagon officials). His perception of the strike's costs and benefits was altered by salient media reports, his fear to appear weak, and his upcoming impeachment trial. Trump's change of perception can be explained by representativeness heuristics and prospect theory (loss aversion). It also explains why the US struck Soleimani on precisely 3 January 2020, while it could likely have done so any other day. Behavioural insights thus prove extremely valuable to explain the strike and are duly accounted for in the model.

Domestic considerations – short-term benefits, especially in an election year – overshadowed other short and long-term costs internationally. The US' position in the Middle East has been irremediably altered, and it was impossible to reliably predict the importance of the risk of further escalation. Yet, it appears that the extremely low risk of effective accountability, coupled with the fact that the bulk of the costs would not be borne by the Trump administration itself, but rather by foreign states in the short term (Iran and Iraq first) and the US in the longer term, played in favour of prioritising shorter-term domestic considerations. The Trump administration thus correctly assessed that any harm to the US' low human rights reputation would be dwarfed by the domestic and geopolitical gains made by the administration. This is where the main difference lies with the French case: the US had very little to lose in terms of human rights reputation and international legal accountability to start with. This, in turn, multiplied the weight of domestic considerations in the decision-making process, as illustrated by ( $R^*+Bnc$ ) in the denominator line of the equation.

In contrast, despite the peculiar terrorist threat of 2015 and the resulting domestic pressure over the government, the one thing that prevented France from engaging in a similar (albeit imprecise) strike was the likelihood of effective accountability from supra-national mechanisms and intelligence partners: it could not risk killing civilians. France's respect for civilians' lives, as professed by President Hollande, represents the state's values (whether genuine or utilitarian) and its perception of its identity. The model accounts for these values and self-perceptions through the four factors constituting the likelihood of effective accountability ( $R+Cnc$ ). This variable further constitutes a protective feature for these values, ensuring that the factors' influence on decision-making will incentivise the state to abide by its values and help sustain its perceived self-identity.

Even though the target of the proposed strike, Abaaoud, turned out to be the mastermind of the attacks of 13 November 2015, abstaining from the strike still avoided serious harm to France's intelligence and human rights reputation. Mid-2015, French intelligence thus assessed that, despite

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<sup>93</sup> As explained by the New York Times, "In the wars waged since the Sept. 11, 2001, attacks, Pentagon officials have often offered improbable options to presidents to make other possibilities appear more palatable." Cooper and others (n 90).



important domestic and short-term costs, there was a long-term protective effect for France's national security in not engaging in gross violations of international law. The high likelihood of effective accountability acted as a pull towards compliance by altering what the state perceived to be in its interest. It bears mentioning that, had France moved forward with the strike, it would have been entirely unproductive since Abaaoud had already left Raqqa for Europe at that time. The strike would therefore have further harmed France's intelligence reputation. Strikingly, this was only avoided due to the high likelihood of effective accountability. One may nevertheless note that the French administration gave way to political pressure on 27 September 2015 with a first airstrike on Syrian territory, illustrating the difficulty of conciliating domestic and international considerations. Yet, this airstrike targeted an ISIS training camp and did not cause civilian victims, thereby striking a balance between France's counterterrorism and reputational interests, and between international obligations, values, and domestic considerations.

This 'most-similar cases' comparative case-study first demonstrated the model's utility as a representation of executive decision-making in intelligence matters by accounting for relevant legal and extra-legal factors, including decision-makers' biases and heuristics. It further illustrated the explanatory function of the likelihood of effective accountability, represented by  $(R+Cnc)$ , regarding state compliance in intelligence matters. Indeed, the case-study confirmed that the opposite outcomes in the French and US cases was due to a difference in the likelihood of effective accountability. Provided the direct relationship between a state's score on  $(R+Cnc)$  and compliance is confirmed in larger-N samples, this variable could also be used as a predictive tool for state compliance.

Finally, although their validity for other cases also needs to be empirically confirmed, the case-study raises additional observations regarding the interplay of international and domestic considerations. First, the higher the score on variable  $(R+Cnc)$ , the less weight is given to domestic considerations in decision-making. Conversely, a low score on variable  $(R+Cnc)$  indicates that domestic considerations will likely be at the top of decision-makers' concerns, to the detriment of international law.<sup>94</sup> What constitutes rational behaviour for executive decision-makers in intelligence matters thus depends upon the potential for effective accountability  $(R+Cnc)$  of each state, all other factors being equal.

## V. CONCLUSION

Accurately representing executive decision-making in intelligence matters is a crucial first step to effectively regulating such activities at the international level. The behavioural analysis and modelling efforts pursued in this article evidence the crucial role played by the international legal order in incentivising compliance, to the effect that the likelihood of effective accountability now constitutes the determining factor for states considering whether to comply with international law in their intelligence activities. This finding allows us to explain state behaviour (compliance and non-compliance) in intelligence matters. In putting forward this model, I invite practitioners and scholars to further test, use, and improve it. I also seek to demonstrate that, although the role played by international law in intelligence matters varies widely between states, its influence on states' interest and behaviour justifies its inclusion in our representations of intelligence decision-making.

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<sup>94</sup> Looking at the US, this seems to be the case regardless of the absolute score attributed to domestic gains, and regardless of the relative score of domestic gains compared to international losses, but further empirical research is needed to confirm this assessment.

This article's findings further allow us to identify compliance-enhancing paths. Indeed, the model shows that increasing the likelihood of effective accountability increases the probability of compliance and decreases the weight given to extra-legal and domestic considerations in decision-making, regardless of the intelligence activity and state considered. In addition, human rights courts and bodies have the capacity to increase the costs of non-compliance for states through the publicity of their decisions, the quality of their argumentation, and the internalisation and diffusion of their norms and standards. Hence, regulatory interventions should focus on enhancing the powers of accountability mechanisms and the quality of the domestic oversight of intelligence activities, and on strategic litigation before competent accountability mechanisms.

## Appendix – Scoring Table

In the model, all factors are attributed a score on a qualitative scale ranging from one to four. The choice of a unique scale from one to four allows the scorer to qualitatively score factors with sufficient precision while still obtaining comparable scores for all factors. To the extent possible, the formulation of the scale allows the external observer to put themselves in the shoes of the decision-maker state at the time of decision-making, whether this time is in the past, the present, or the future. Some of the criteria assessed are necessarily objective as they rely on a factual assessment of openly available data, but others rely on the knowledge of the state and its expectations, and integrate the beliefs, preferences and motives of the state. However, a perfectly ‘subjective external’ assessment remains impossible, and this limitation inherent to the model is acknowledged.

Apart from the expectation of publicity, which acts as an activity-specific multiplier with regard to the likelihood of effective accountability, the initial score of each factor is then multiplied by the initial score of the other factor forming part of the element of the equation. This leads to each element (but for P; and R\*, which is scored by comparison with R) having a numerical value comprised between one and sixteen: 1 – 2 – 3 – 4 – 6 – 8 – 9 – 12 – 16. Factors and their scale are defined in the following table.

Factor	What is assessed	Scale
<b>Human Rights Record and Reputation</b>	The state’s membership of human rights organisations; ratification of human rights treaties; outward appearance of respect for its human rights obligations and willingness to improve (e.g., implementation of judgments, engagement with treaty bodies’ procedures, etc.).	<b>1:</b> null or clearly insufficient.
		<b>2:</b> member of some human rights bodies and ratification of some of the main treaties but human rights are not at the forefront of government policies and many important systemic human rights issues remain in the country.
		<b>3:</b> member of relevant human rights bodies and ratification of the main treaties; the state prides itself in participating in human rights improvement but a few significant human rights issues persist in the country.
		<b>4:</b> member of all relevant human rights bodies; ratification of the main treaties; acceptance of individual complaint procedures; and the state prides itself in having a near-exemplary human rights record.
<b>Quality of Domestic</b>	The state’s existing domestic structures for oversight of its intelligence activities, the presence of a sufficiently	<b>1:</b> null or clearly insufficient.

<b>Oversight of Intelligence Activities</b>	independent democratic oversight body, and their actual powers, including ex ante authorisation of intrusive powers; complaints handling; access to information related to foreign intelligence cooperation; and sufficient resources.	<p>2: existing system of oversight but lacking most of the powers necessary for effective oversight (e.g. no access to classified documents).</p> <p>3: existing system of oversight with some actual power but lacking several of the necessary qualities or competences.</p> <p>4: existing and effective system of oversight that complies with most of the recognised standards and good practices.</p>
<b>Domestic Costs</b>	The backlash likely to be faced by the current administration if they maintain the status quo and do not adopt the internationally wrongful measure under consideration.	<p>1: the current administration will not face any domestic backlash if they do not adopt the measure.</p> <p>2: the current administration will face some limited domestic backlash if they do not adopt the measure.</p> <p>3: the current administration will face important domestic backlash if they do not adopt the measure.</p> <p>4: the current administration will most likely be overthrown if they do not adopt the measure.</p>
<b>Intelligence Losses</b>	The losses in intelligence if the state does not adopt the measure, either because cooperation with foreign partners will be hindered or because a domestic programme will be disrupted or interrupted, or both. The factor only covers losses in the sense that maintaining the status quo will lead to intelligence losses. The definition thus excludes from consideration the gains to be made by adopting the measure under scrutiny.	<p>1: no losses in intelligence obtained domestically or through cooperation if the measure is not adopted.</p> <p>2: some limited intelligence losses (e.g., disruption of a small programme or diminution of the flow of intelligence sharing with another state) if the measure is not adopted.</p> <p>3: significant intelligence losses (e.g., interruption of a small programme or disruption of an important programme or of the flow of intelligence sharing) if the measure is not adopted.</p> <p>4: vital intelligence losses (e.g., interruption of intelligence cooperation or of a successful programme) if the measure is not adopted.</p>

<b>Strength of Accountability Network</b>	<p>The following factors are assessed as weak, medium, or strong, leading to an overall evaluation of the strength of the network of accountability mechanisms comprised of all other states and competent supra-national courts and bodies:</p> <p><u>Capacity to constrain and escalate:</u></p> <p>Jurisdiction <i>ratione materiae</i>; Jurisdiction <i>ratione personae</i>; Investigatory powers; Powers to sanction non-cooperation; Capacity to order remedies; Capacity to sanction; Reputation of account-holder state (Standing in the international legal order; Relative power; Human rights record); Capacity of account-holder state to constrain compliance in practice (Interdependencies; Leverage tools).</p> <p><u>Legitimacy:</u> Overall reputation; Participation of the state under scrutiny; Capacity to reward compliance or de-escalate; Independence (Budget and resources; Formal independence; Judicial independence; Relative power).</p> <p><u>Accessibility and publicity:</u> Representation of public interest; Publicity of proceedings; Publicity of outcomes; Accessibility to non-state accountability holders (Information; Financial and geographical accessibility; Procedural accessibility).</p>	<p>1: the network of accountability mechanisms is weak all around.</p> <hr/> <p>2: the network of accountability mechanisms is generally weak but possesses some stronger aspects.</p> <hr/> <p>3: the network of accountability mechanisms is generally strong, with some weaker aspects.</p> <hr/> <p>4: the network of accountability mechanisms is strong all around.</p>
<b>Intelligence Reputation and Human Rights Reputation Losses</b>	<p>The reputation of the state as an intelligence partner and domestically. Intelligence reputation losses are most likely to occur when other states or citizens deem it unwise to cooperate with the state because of human rights concerns and/or because the intelligence produced is deemed unreliable or unusable. A loss in intelligence reputation is therefore correlated with the state's human rights reputation, and is only compensated by access to new and otherwise</p>	<p>1: if the measure is adopted, this will have no effect on the state's reputation, whether for human rights or for intelligence: other states and citizens will maintain identical intelligence cooperation.</p> <hr/> <p>2: if the measure is adopted, some states will likely review the terms of cooperation or impose additional human rights safeguards, and citizens' trust in the state will be harmed.</p> <hr/>

	inaccessible intelligence if this intelligence is considered reliable as well as usable, i.e. not tainted by human rights violations.	<p>3: if the measure is adopted, many states will likely review the terms of cooperation or impose additional human rights safeguards, and some states and most citizens will likely stop all intelligence cooperation.</p> <p>4: if the measure is adopted, the state will become an outcast in the international intelligence cooperation arena and citizens' trust will be entirely lost.</p>
<b>Productivity of the Measure</b>	The costs/benefits analysis of the measure. This includes financial and human (intelligence personnel) costs for the state but excludes all other costs as they are part of the wider analysis and some (like human rights) are not to be balanced against other considerations.	<p>1: the measure will not produce reliable intelligence.</p> <p>2: the measure will produce some reliable intelligence but not enough to justify its human and financial costs.</p> <p>3: the measure will produce reliable intelligence, meeting the costs.</p> <p>4: the measure will produce reliable intelligence, with benefits surpassing the costs.</p>
<b>Other Intelligence and Domestic Gains</b>	<p>The international and domestic intelligence reputation gains that adopting the measure will ensure (e.g., access to a new source of intelligence will drive international cooperation); and other domestic benefits that the administration will derive from such adoption. These include an appearance of toughness; a decrease in domestic opposition; increased favourable opinion ratings; and increased executive powers and missions.</p> <p>These domestic benefits usually take the form of increased national security in the narrow sense of the term, meaning the security of governmental institutions, and are not correlated with a decrease in actual security threats against the state and its population.</p>	<p>1: the measure will not increase intelligence reputation or national security.</p> <p>2: the measure will limitedly increase intelligence reputation or national security.</p> <p>3: the measure will significantly increase intelligence reputation or national security.</p> <p>4: the measure will strongly increase the intelligence reputation of the state <i>and</i> its national security.</p>
<b>Expectation of Publicity</b>	The probability, as assessed by the decision-maker, that the measure will become public, either due to its nature (e.g.,	1: null or quasi-null.

	legislation, measures involving individuals, or able to be witnessed) or through leaks; and the timeframe of such publicity.	<div data-bbox="1236 196 2033 236">2: long-term risk.</div> <div data-bbox="1236 242 2033 282">3: medium-term risk.</div> <div data-bbox="1236 288 2033 322">4: short-term risk.</div>
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