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Espionage in International Law: A Necessary Evil

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“There never has been a war without spies, and there never has been a peace in which spies have not engaged in preparations for a future war.”

- Kurt D. Singer, 1948
Three thousand years of espionage; an anthology of the world's greatest spy stories (1948), vii.

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INTRODUCTION

While conducting a research on the historical evolution of intelligence activities in Canada, I realized how intelligence is still, today, an obscure subject, hidden behind cloaks of political and diplomatic nature. On this matter, Berke and Horrall wrote that "[i]t is curious that there is not more published material available on the history of our intelligence service".[1] I personally think that it's not curious but just the way it is.

Espionage, a part of the activities of intelligence services, looked under the perspective of international law, is maybe more documented but not less blur and obscure. The present study has been done with the objective of getting to know how international law is dealing with the activity of espionage, in order to realize whether there is an actual concern about that kind of practice. We will also look at basic principles as well as more detailed terms regarding espionage. Finally, we will have a look at the distinction made between espionage in time of war and espionage in time of peace.

The first part deals with the basic principle, set in international law, of non-intervention in internal affairs of foreign countries. Chapter two presents the concepts of spy and espionage, and how law is describing them. We will also examine the issue of the responsibility of the state that sent a spy in a foreign country or territory. Finally, chapters three and four present the difference that has to be made between espionage in time of war and peacetime espionage.

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[1] C. Betke and S.W. Horrall, *Canada's Security Service: An historical outline 1864-1966*, (1978), ix, cited in J. Mellon, *L'évolution du renseignement de sécurité au Canada* (1999), 2.

1. THE DOCTRINE OF NON-INTERVENTION IN INTERNAL AFFAIRS

We can assume that to engage in espionage activities constitutes an intervention of a person into the affairs of a state. However, the concept of intervention in international law has a specific meaning that is important to understand in order to determine whether espionage is an intervention in internal affairs of a state.

1.1 THE PRINCIPLE OF SOVEREIGN EQUALITY

The chief attribute of statehood is sovereign equality, which is enunciated in Article 2 of the Charter of the United Nations. Virtually all the states of the world agree on certain rules, and the sovereign equality is among them.

The concept of sovereignty implies that the state is independent in its self-governance. The concept of equality implies that each state is legally equal to all others; it means that all the states have the same "individual" rights and obligations. The notion of equality explains the notion of sovereignty and implies state's independence while conducting internal population and territorial affairs, the right to defend itself and the right to be free of interference from any other state.

Article two of the Charter of the United Nations states:

> The Organization and its Members, in pursuit of the Purposes stated in Article 1 [Purposes of the United Nations], shall act in accordance with the following Principles.
>
> 1. The Organization is based on the principle of sovereign equality of all its Members.
>
> [...]

> 4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

As summarized in the Kindred et al's International Law, "[t]he dual concepts of sovereignty and equality are the cornerstone of public international law. Being sovereign and equal to others, a state has certain rights and corresponding duties. The rights include exclusive control over its territory, its permanent population [...] and other aspects of its domestic affairs. The necessary corollary is that there is a duty not to intervene overtly or covertly in the affairs of other states and thus not to interfere with their exclusive domestic jurisdiction."[2]

However, a state can voluntarily surrender part or its entire sovereignty. For example, a state can do so for customs purposes (see the Austro-German Customs Union Case[3]) or to comply with some obligations included in a treaty.

1.2 THE CONCEPT OF INTERVENTION

There's a violation of a state's sovereignty when another state intervenes in that state's internal affairs. It's therefore important to understand what we mean by "intervention".

The Montevideo Convention of 1933 is a well-known treaty setting out the basic characteristics of statehood, which includes the principle of state's sovereignty and the concept of non-intervention. In addition, "[a]ll the American states emphasized, in this and other inter-American Treaties, the

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[2] H.M. Kindred *et al*., *International Law, Chiefly as Interpreted and Applied in Canada* (5th ed., 1993), 16.

[3] Adv. Op. (1931), P.C.I.J., Ser. A/B, No.41.

duty of non-intervention, whether direct or indirect, in either the internal or external affairs of other states."[4]

"In the definition of intervention, stress has been laid on the words dictatorial and interference. Persuasion is said to be legitimate; coercion, dictatorial and illegitimate; but the line between the two may be vague."[5] Intervention is often understood to be an action of a state that will have effects in the internal affairs of another state. The Merriam-Webster Dictionary gives a meaningful definition of the verb "to intervene": "to interfere usually by force or threat of force in another nation's internal affairs especially to compel or prevent an action"[6].

With such definition, it is clear that intervention cannot exist in accordance with principles of international law. "Intervention invades the territorial integrity and denies the political independence of another state."[7] But intervention can also mean to abstain from doing certain things, like inciting propaganda or libellous utterances. Likewise, a government should exercise due diligence to prevent any armed expeditions from leaving its territory to operate against another state.

1.3 EXAMPLES OF JUSTIFIED INTERVENTIONS

As we have seen, one of the components of state's sovereignty implies the right to be free of any

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[4] Q. Wright, "Espionage and the Doctrine of Non-Intervention in Internal Affairs" (1962) in R. Stanger ed., *Essays on Espionage and International Law*, 3, at page 4. Following is a quote from President Eisenhower, of April, 1953: "Any nation's right to a form of government and an economic system of its own choosing is inalienable. Any nation's attempt to dictate to other nations their form of government is indefensible."

[5] Q. Wright, *supra* note 4, at 5.

[6] Merriam-Webster, (visited on November 28, 1999), WWWebster Dictionary, [Online], URL: http://www.m-w.com/dictionary.htm

[7] Q. Wright, *supra* note 4, at 4.

interference from other states. The issue is to know if a specific action is in fact an "interference" or an "intervention" and if it could be legally justified in international law.

Even if intervention invades the territorial integrity and denies the political independence of another state, it can be justified on various grounds[8]. It might be important to have an idea of what could be a justified intervention, in order to determine if espionage could somehow constitute a justified intervention.

Concerning this idea of justified intervention, Wright gives a summary of how a state could intervene legally regarding to international law principles:

> A state can undoubtedly protest acts which it deems in violation of its rights and can make representations or even resort to economic retorsions against acts it deems adverse to its interests. It can go further and conduct reprisals not involving the use of armed force to rectify injuries arising from violation of its rights, if the available peaceful means of adjustment or reparation have been exhausted without results, and the means of reprisal are no more serious than the injury complained of. Finally, a state can use armed force to defend its territory or armed forces against armed attack, to assist others that are victims of such attack, or to assist the United Nations 'to maintain or restore international peace and security" in case of "threat to the peace, breach of the peace, or acts of aggression" or to enforce a judgement of the International Court of Justice.[9]

Giving examples of this principle of justified intervention could help understanding its full extent. First, an intervention can be justified when s state has the duty to promote the self-determination of peoples. However, according to international law, states cannot act in way that will cause another state' sdismemberment. We are then in front of a paradox between the duty to intervene and the prohibition to cause another state' s dismemberment.

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[8] See H.M. Kindred *et al*., *supra* note 2, at. 835.

[9] Q. Wright, *supra* note 4, at 16.

An armed intervention authorized by the Security Council of the United Nations can also be considered as a legally justified intervention. The operations that took place during the Gulf War are a good example of that kind of intervention.

Also, it' s not illegal for a state to use force, which is a type of interference, for self-defence. However, it' s not clear whether preventive strikes are considered as self-defence. Because some threats can be interpreted as sufficiently imminent, preventive strikes can be, in some cases, considered essential and therefore justified. In other cases, preventive strikes can be covers for offensive strikes under false pretexts.

An interference in another state' s internal affairs can be justified by humanitarian reasons. A good example was the armed interventions in Kosovo, where operations have been made in order to stop the ongoing genocide.

If a state asks for the intervention of another state in its own internal affairs, this action is clearly justified, just like it was in the case of East Timor, in September 1999.

A state can also intervene in the affairs of another state - usually one of its neighbours - in order to stop the invasion of refugees going away from that other country in its own territory or in the one of another state.

Finally, another justification given for intervention is to prevent economic harm, an explanation that Canada used in the case of the Spanish trolls fishing in Canadian territorial seas. Canada considered it as a threat to an important Canadian economic activity.

In conclusion, following the explanation of the doctrine of non-intervention and the above examples of justified intervention, we can conclude that states act inconsistently with international law when they direct agents of their intelligence services in another state' s territory and they infringe that state' s domestic law[10].

2. ESPIONAGE AND SPIES

This section will examine the legal interpretation of the activity of espionage and of the actors that are the spies. Will also be discussed the issue of the state' s responsibility regarding the actions of a spy who is one of its nationals, whether he' s an official emissary or an ordinary civilian acting on his own.

2.1 ESPIONAGE

2.1.1 DEFINITION

Generally, espionage is understood as 'the secret collection of information, or intelligence, that the source of such information wishes to protect from disclosure."[11] Intelligence, in that context, refers to evaluated and processed information needed to make decisions, especially in the fields of making of governmental and military policies. However, it can also relate to business, military and economic decisions. Intelligence generally has a national security connotation and therefore exists in an aura of secrecy.

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[10] G. Cohen-Jonathan and R. Kovar, 'L' espionnage en temps de paix" (1960), 6*Annuaire français de droit international* 239, at 254.

[11] L.L. Bram ed., 'Espionage" (1995), *Funk & Wagnalls New Encyclopedia* [CD-ROM].

To define the legal concept of espionage, it can be useful to look at the definition given to the word "spy" [12], which is closely related to the one given to the word "espionage". But for the specific definition of espionage, some international conventions can be used.

First, the Regulations Respecting the Laws and Customs of War on Land are interesting in the fact that they are indirectly recognizing the legitimate use of espionage activities in time of war. In the Chapter one (Means of Injuring the Enemy, Sieges, and Bombardments) in the Section two (Hostilities), the regulations set, in article 24, that "[r]uses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible"[13].

Also, the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts gives another example of how espionage can be defined, in its article 39 called Emblems of Nationality[14]:

> 1. It is prohibited to make use in an armed conflict of the flags or military emblems, insignia or uniforms of neutral or other States not Parties to the conflict.
>
> 2. It is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations.
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> 3. Nothing in this Article or in Article 37, paragraph one (d), shall affect the existing generally recognized rules of international law applicable to espionage or to the use of flags

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[12] See Section 2 of this Chapter (Spies), under Subsection 1 (Definition).

[13] World War I Document Archive, (visited on November 23, 1999), The Hague Convention, [Online], URL: http://www.lib.byu.edu/~rdh/wwi/hague/hague5.html

[14] University of Vienna, (visited on November 22, 1999), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), [Online], URL: http://www.ifs.univie.ac.at/intlaw/konterm/vrkon_en/html/doku/gc-pi.htm

in the conduct of armed conflict at sea.

Edmondson, in his article, makes an interesting distinction, writing that "espionage in the classic sense can be characterized in two distinct ways: as to the nation, it was an extraterritorial act of state for which the state was not responsible; as to the agent, it was an intentional act of deception which rendered him personally and criminally liable to the offended government."[15] However, the industrial revolution of the past century coupled with the rapid technological advancement of the present have made espionage a far more complex and broad concept. Today, espionage involves corporations trying to gather secret industrial information, interception of telecommunication[16] and utilisation of high-tech equipment which makes the physical presence of spies in the target territory no longer necessary.

He also states that "the essence of spying is not false pretense, but simply unauthorized disclosure. Consequently, the concern for inability to control the flow of information has taken precedence over protection against deception as the principal concern of modern states."[17] This assertion implies that the modern governments put more efforts on the preventive protection of their information than on the detection of foreign spies, a more demanding and troublesome task.

As said before, to complete the analysis of the definition of "espionage", it could be appropriate to also read the definition of spies discussed in the following section two. But to go forward in the conceptualisation of espionage in international law, it is relevant to study the legality of this

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[15] L.S. Edmondson, "Espionage in Transnational Law"(1972), 5 *Vanderbilt Journal of Transnational Law* 434, at 434.

[16] On the particular issue of covert interception of foreign communications, see the Interception Capabilities 2000 report, entirely reproduced on Duncan Campbell' s Website at http://www.gn.apc.org/duncan/ic2kreport.htm

[17] L.S. Edmondson, *supra* note 15, at 435.

controversial activity.

2.1.2 THE LEGALITY OF ESPIONAGE

It is well recognized that, commonly, the activity of espionage is made illegal under domestic laws. But does international law proscribe espionage?

There is a distinction to make between espionage in war and espionage in peacetime. In addition, in time of war, "[i]f a member of the armed forces carrying out espionage wears a uniform, he is no longer a "spy" but has a slightly more respectable status as a "reconnaissance" scout [18]. If taken prisoner by the enemy, a reconnaissance scout will have the privileges of a prisoner of war and may not be executed."[19] In the other hand, in peacetime, the situation is entirely different. As we saw previously, espionage is considered inconsistent with international law, since it constitutes an affront to the territorial integrity of states, to their sovereignty and to the principle of peaceful cooperation of states.

However, the current problem is that espionage, carried out by spies in disguise acting under false pretences, doesn't fall under any "crime" listed as illegal activities by international organization or bodies such as the International Court of Justice. "As yet, the term "crime" against international law is reserved for acts of aggressive war, serious war crimes or crimes against humanity"[20], among which espionage cannot be easily incorporated.

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[18] As said in L. Oppenheim, *International Law, A Treatise* (vol. 2, 7th ed., 1948), 423: "[e]spionage must not be confused, first, with scouting, or secondly, with despatch-bearing."

[19] I. Delupis, "Foreign Warships and Immunity for Espionage" (1984), 78 *American Journal of International Law* 53, at 67.

[20] *Ibid*., at 68.

In conclusion, the legality of espionage depends largely on the context, whether it is conducted during peacetime or wartime. For further details regarding this distinction, refer to Chapters three (Espionage in Time of War) and four (Peacetime Espionage).

2.1.3 ESPIONAGE AS AN OFFENCE

In their essay on the issue of espionage during peacetime, Gérard Cohen-Jonathan and Robert Kovar analyse the activity of espionage as an illegal infraction in international law and present the necessary elements of espionage as an infraction. There are three elements: the "élément matériel", the "élément subjectif", and the "élément personnel" [21].

The material element concerns the objective of espionage. Intelligence services have usually the mission to gather information about other states; this information is secret but is however essential to the government's policy making activities. Espionage has been, for a long time, aimed principally to military information gathering but today, since states have established permanent armies, espionage of diplomatic secrets has become more and more significant. In fact, military espionage is today much more "diplomatic espionage", where states try to know the acts and intentions of other states in order to anticipate their moves and their actions.

Today, a war is frequently the solution to economic conflicts and therefore, economic espionage is now a great part of intelligence services' mission. They quickly understood how useful can industrial and economic information is, since economic decisions build most of our current government's policies. Therefore, economic espionage is now, with military and diplomatic espionage, part of the objective of espionage.

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[21] This Subsection is based on G. Cohen-Jonathan and R. Kovar,*supra* note 10, at 240 to 246.

The subjective element, secondly, is the intention of actually doing the activity of espionage, to spy. The offence requires the spy to have had the will, the intention of spying. Also, most states consider the attempt of spying as an offense as well. The distinction, again, has to be made between peacetime and wartime, where in peacetime, the accused doesn' t have to be caught wearing a disguise to be convicted.

Finally, the third element of the offence of espionage is the personal element, where we have to identify the victim and the beneficiary. In cases of espionage, the victim is usually the state on which territory the espionage has been carried out. Structure of the state can influence the identification of the "victim", since some states are divided in provinces, states or regions that can therefore be the real victims of espionage instead of the whole state.

The beneficiary, on the other hand, is usually described, in criminal law, not according to a particular state but rather to a third party of a foreign organisation. In fact, the proliferation of international organisations and their increasing range of action and jurisdiction make them potential beneficiaries of espionage as well as states or armed forces.

In conclusion, the espionage as an offence requires three basic elements. First, the action as to be what we define as being espionage; second, the spy must have had the intention of spying or trying to spy; thirdly, we have to be able to identify a victim and a beneficiary of such espionage.

2.1.4 THE NATURE OF ESPIONAGE

Always in order to define how espionage is considered in respect to international law, Gérard Cohen-Jonathan and Robert Kovar make three statements that are supporting their hypothesis according to

which espionage violates international law[22]:

1) L' espionnage fait appel à des moyens qui en eux-mêmes constituent des actes contraires au droit international.

2) L' espionnage est pratiqué par des personnes bénéficiant du statut diplomatique.

3) L' espionnage est le fait de particuliers.

These three statements are translated and described below.

First, espionage is an activity involving means that are, by themselves, transgressing international law. Often, it happens that an act constitutes a violation of an international obligation, causing a prejudice for which reparation can be asked and that this offence is distinct from the one of espionage. For example, if a plane flies over one state' s territory without proper authorization, having the mission to conduct espionage, the apparent infraction is the violation of that country' s airspace; the objective of that plane could eventually be relevant only as an aggravating circumstance[23].

Secondly, espionage is carried out by individuals having diplomatic status. It' s in fact very common that espionage cases involve diplomats or persons having such status. The reason is very simple: one of the basic missions of a diplomat is to gather information about the state where he or she is assigned in order to help the relations between the sending state and the host state. When gathering this information, diplomats can be tempted to collect more than what is lawful to be collected. However, because they are protected by what we call the diplomatic immunity[24], individuals with

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[22] G. Cohen-Jonathan and R. Kovar,*supra* note 10, at 246 to 255.

[23] This example refers to the U-2 incident, involving the United States and the former USSR, discussed later in Section 2 (The U-2 Incident) of Chapter 4 (Peacetime Espionage).

[24] Generally about diplomatic immunities, see H.M. Kindred *et al*., *supra* note 2, at. 312 to 323.

diplomatic status caught while conducting espionage activities cannot be tried under domestic law. The host state can use very limited means of punishment, the most common one being to declare the individual *persona non grata*. Other actions that can be taken against spies are discussed later in this Chapter[25]. Also, it' s rarely that a state victim of espionage can rely on the sending state' s responsibility for reparation, state' s liability in espionage cases being virtually inexistent[26].

Finally, espionage is actually an activity conducted by individuals. Therefore, state' s responsibility is likely not to be ever engaged because of the activity of one of its nationals. However, the question is not clear when we look at espionage conducted by officials, like diplomats, legally representing their home state in their day-to-day activities. Again, this question will be discussed separately later in this Chapter.

2.2 SPIES

2.2.1 DEFINITION

Spies, obviously, are the individuals carrying out the activity of espionage described and analysed above. But international law has been more precise and makes distinctions that refine the definition of a spy. The definition of a spy can be found in conventions, such as the two discussed here.

The first one is the Convention Respecting the Laws and Customs of War on Land. It entered into force on January 26, 1910, and has an annex containing the Regulation Concerning the Laws and Customs of War on Land. In this Annex, under Chapter two (Spies) of Section two (Hostilities),

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[25] See Subsection 2 (Treatment of Spies) under Section 2 (Spies) of this Chapter.

[26] See Section 3 (State' s Responsibility) of this Chapter.

Article 29 states that[27]:

> A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent[28], with the intention of communicating it to the hostile party.
>
> Thus, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. Similarly, the following are not considered spies: Soldiers and civilians, carrying out their mission openly, entrusted with the delivery of despatches intended either for their own army or for the enemy' s army. To this class belong likewise persons sent in balloons for the purpose of carrying despatches and, generally, of maintaining communications between the different parts of an army or a territory.

In addition, the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, in its article 46 (Spies), gives a definition of that term[29]:

> [...]
>
> 2. A member of the armed forces of a Party to the conflict who, on behalf of that Party and in territory controlled by an adverse Party, gathers or attempts to gather information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces.

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[27] Yale Law School, (visited on November 23, 1999), Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land. The Hague (18 October 1907), [Online], URL: http://diana.law.yale.edu/diana/db/4198-21.html

[28] For an interpretation of the phrase "in the zone of a belligerent" see *United States* v. *McDonald*, 265 Fed. 754; *Annual Digest*, 1919-1922, Case No. 298, where the Court held that the conditions of the First World War brought the port of New York within the field of operations.

[29] University of Vienna, *supra* note 14.

> 3. A member of the armed forces of a Party to the conflict who is a resident of territory occupied by an adverse Party and who, on behalf of the Party on which he depends, gathers or attempts to gather information of military value within that territory shall not be considered as engaging in espionage unless he does so through an act of false pretences or deliberately in a clandestine manner. Moreover, such a resident shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured while engaging in espionage.
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> 4. A member of the armed forces of a Party to the conflict who is not a resident of territory occupied by an adverse Party and who has engaged in espionage in that territory shall not lose his right to the status of prisoner of war and may not be treated as a spy unless he is captured before he has rejoined the armed forces to which he belongs.

"Disguise" and "false pretences" are the essential components of the activities of spies. Even as early as in 1863, the concept of spy was including these two elements: "A spy is a person who, secretly, in disguise or under false pretenses, seeks information with the intention of communicating it ti the enemy. The spy is punishable with death by hanging by the neck, whether or not he succeeds in obtaining the information or in conveying it to the enemy."[30] Authors agree on the fact that these two ingredients are the essential requisites of the offence of military espionage and that secrecy has nothing to do with it.

A more comprehensive definition describes spies as "agents of state sent abroad for the purpose of obtaining clandestinely information in regard to military, political or industrial value to the state, or for other clandestine purpose. They are not official agents of states for the purpose on international

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[30] F. Lieber and Hitchcock, "Instructions for the Government of the Armies of the United States in the Field" (1863) 100 *General Orders* par. 88, cited in H.W. Halleck, "Military Espionage" (1911), 5 *American Journal of International Law* 590, at 591.

relations."[31] In addition, the term spy has "a technical meaning in international meaning in international law insofar as it implies the loss of immunity and any protection by the home state."[32]

Finally, regarding the treatment of spies, Leslie Edmondson makes a distinction in the definition of a spy, between a "belligerent spy" and a "non-belligerent spy" [33]. This distinction is discussed in the following Section (Treatment of Spies).

2.2.2 TREATMENT OF SPIES

Here again, international conventions may constitute an appropriate way to address the particular subject of the treatment of spies.

First, the Convention Respecting the Laws and Customs of War on Land, in the Articles 30 and 31 of its Regulation Concerning the Laws and Customs of War on Land, states that[34]:

> 30. A spy taken in the act shall not be punished without previous trial.
>
> 31. A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage.

Article 31 means that a spy who spied, went back to where he was coming from then get caught by the victim of his espionage activities, has to be treated as a prisoner of war, with all the rights and

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[31] L. Oppenheim, *Oppenheim's International Law* (vol. 1 (parts 2 to 4), 9th ed., 1992), 1176.

[32] I. Delupis, *supra* note 19, at 62.

[33] L.S. Edmondson, *supra* note 15, at 438.

[34] Yale Law School, *supra* note 27.

privileges attached to that status and set up in international conventions. Otherwise, Article 30 applies and a trial is required

In addition, the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts deals, in its Article 46, with the treatment of spies caught while engaging espionage[35]:

> 1. Notwithstanding any other provision of the Conventions or of this Protocol, any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy.

Finally, Article 68 of the Convention Relative to the Protection of Civilian Persons in Time of War deals with "protected persons" and states that espionage is the only offence for which a victim state can execute one of them[36]:

> Protected persons[37] who commit an offence which is solely intended to harm the Occupying Power, but which does not constitute an attempt on the life or limb of members of the occupying forces or administration, nor a grave collective danger, nor seriously damage the property of the occupying forces or administration or the installations used by them, shall be liable to internment or simple imprisonment, provided the duration of such internment or imprisonment is proportionate to the offence committed.
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> Furthermore, internment or imprisonment shall, for such offences, be the only measure

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[35] University of Vienna, *supra* note 14.

[36] University of Vienna, (visited on November 22, 1999), Convention (IV) Relative to the Protection of Civilian Persons in Time of War, [Online], URL: http://www.ifs.univie.ac.at/intlaw/konterm/vrkon_en/html/doku/gc-iv.htm

[37] See Article 4 of the Convention Relative to the Protection of Civilian Persons in Time of War.

adopted for depriving protected persons of liberty. The courts provided for under Article 66 of the present Convention may at their discretion convert a sentence of imprisonment to one of internment for the same period.

The penal provisions promulgated by the Occupying Power in accordance with Articles 64[38] and 65[39] may impose the death penalty on a protected person only in cases where the person is guilty of espionage, of serious acts of sabotage against the military installations of the Occupying Power or of intentional offences which have caused the death of one or more persons, provided that such offences were punishable by death under the law of the occupied territory in force before the occupation began.

The death penalty may not be pronounced on a protected person unless the attention of the court has been particularly called to the fact that since the accused is not a national of the Occupying Power, he is not bound to it by any duty of allegiance.

In any case, the death penalty may not be pronounced on a protected person who was under eighteen years of age at the time of the offence.

In fact, there is again here a distinction to do between the treatment of spies on peacetime and on wartime. Basically, the rule followed so far is that spies on wartime may be executed for their actions while, on peacetime, they have to be treated under domestic criminal law. Authors refined that

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[38] Article 64 says that: "The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention; Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws; The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them."

[39] Article 65 states that: "The penal provisions enacted by the Occupying Power shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language. The effect of these penal provisions shall not be retroactive."

distinction and clarified details concerning treatment of spies.

In his article, Edmondson distinguishes, within international law, two classes of agents for purposes of treatment upon capture. "A belligerent spy is an officer or soldier of a hostile army who clandestinely obtains or seeks to obtain information within the zone of military operations for the use of his army. A non-belligerent spy is either a civilian agent of a belligerent state secretly operating anywhere, or a military spy secretly operating within the interior of the opposing belligerent nation."[40] Both classes of spies are denied the status of prisoner of war. The difference is among the defences available when tried for espionage[41].

Edmondson summarizes the defences as following[42]:

> Three defences are available to a charge of belligerent espionage under the law of war. First, an accused may plead as a matter of fact that he was not collecting or seeking to collect information for use by anther state. Secondly, since deception is still the essence of wartime espionage, proof that a military soldier was in uniform or identifiable as an enemy is a complete defence and requires that the captor treat the captive as a POW [prisoner of war]. Finally, the law of war requires that the belligerent spy be caught in an act of espionage as a condition to his loss of POW [prisoner of war] status.

As stated by Henry W. Halleck, '[m]ilitary espionage has been regarded from time immemorial, in all countries and among all nations, as a military offence of great criminality, Its penalty is death by hanging."[43] Even if spies are maybe no longer hung by the neck, the treatment is still strong. At that time, around 1910, the reasoning is that '[s]pies are generally condemned to capital punishment, and

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[40] L.S. Edmondson, *supra* note 15, at 438.

[41] Article 30 of the Convention Respecting the Laws and Customs of War on Land requires that a "spy taken in the act shall not be punished without previous trial".

[42] L.S. Edmondson, *supra* note 15, at 439.

[43] H.W. Halleck, supra note 30, at 590.

with great justice, since we have scarcely any other means of guarding against the mischief they may do us. For this reason a man of honour, who is unwilling to expose himself to an ignominious death from the hand of a common executioner, ever declines serving as a spy [...]"[44]. Today, the severity of the treatment has been justified on various grounds, all of which ultimately rest on the danger posed by the spy[45].

Now, regarding the diplomats caught spying, in peacetime, no action can be taken against them since they enjoy diplomatic immunities. They cannot be arrested nor incarcerated (personal immunity) and cannot be tried before domestic courts (jurisdictional immunity). The victim state can however declare the diplomat persona non grata[46].

The state of which the spy is a national was usually denying the facts or simply ignoring him. But since the U-2 incident, states sometimes recognize their intelligence activities abroad. In that case, the United States clearly recognized that a spy of its intelligence services was engaged in espionage activities on its behalf[47]. So, usually, in peacetime, espionage is considered as "unfriendly" and therefore is considered simply as an act that is likely to make the relations between states more difficult and tensed.

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[44] *Ibid*., at 591.

[45] However, "the death penalty may be imposed on a civilian inhabitant only in cases when the person concerned is guilty of espionage, of serious acts of sabotage against the military installations of the occupant or of the intentionally causing death - provided that such offences were punishable by death under the law of the occupied territory prior to occupation, that the attention of the Court has been called to the fact that the accused does not owe any duty of allegiance to the occupant, and that he or she was not under eighteen years of age at the time of the offence"; L. Oppenheim, *supra* note 18, at 454.

[46] G. Cohen-Jonathan and R. Kovar, *supra* note 10, at 249.

[47] The U-2 incident, involving the United States and the former USSR, is discussed later in Section 2 (The U-2 Incident) of Chapter 4 (Peacetime Espionage).

Sometimes, the matter is one of wearing or not the uniform, or in other words, to act or not openly as a spy. 'Spies in disguise are themselves responsible for their acts and will be accordingly punished. They enjoy no protection by their home state and no immunity for their acts. State agents who do not conceal their status, however, can rely on the protection of their home state and enjoy immunity for their acts of espionage carried out on orders of their home state."[48]

2.3 STATE'S RESPONSIBILITY

A state is responsible for official and authorised acts of its administrative officials but also 'for internationally injurious acts committed by such persons in the ostensible exercise of their official functions but without that state' s command or authorisation, or in excess of their competence according to the internal law of the state, or in mistaken, ill-judged or reckless execution of their official duties."[49]

In practice, it' s not always easy to draw the distinction between what has been authorised and what has been not. But what commonly happens is that the sending state will most likely disavow any knowledge of the caught spy. Therefore, the agent is usually on his own, facing local courts personally. However, 'where a state assumes responsibility for the actions of a spy after he is caught but before he is impleaded, it may be that the offence can be brought back to the state-to-state level, entailing measures of apology, or of force, or of reparation."[50] This situation, where a state accepts to engage its responsibility, is very rare and the spy is left to his own fate. The U-2 incident, discussed later, is a good example of a state engaging its responsibility for espionage conducted by

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[48] I. Delupis, *supra* note 19, at 63.

[49] L. Oppenheim, *supra* note 31, at. 545.

[50] I. Delupis, *supra* note 19, at 70.

one of its spies. In addition, in that case, the individual was also held responsible for the offence of espionage (double responsibility), even if, normally, the responsibility under international law is suspended when individual responsibility is engaged under municipal law.

Moreover, if the individual responsibility of the spy cannot be engaged, it usually operates as a shield of immunity for the individual against any legal process in municipal courts and the state will be the entity held responsible for the offence.

Finally, in a limited sense, 'the state can become accountable for its espionage activity not only to the other state but also to its agent and perhaps to third parties as well."[51]

3. ESPIONAGE IN TIME OF WAR

The traditional approach to espionage sets the spy largely in the context of war or enemy occupation. In both settings the rules bore hard against the spy. 'The legitimacy of espionage in time of war arises from the absence of any general obligation of belligerents to respect the territory or government of the enemy state, and from the lack of any specific convention against it."[52] Even so, for the most part, the law of espionage in time of war has been codified in the Hague Regulations of 1899 and 1907 (discussed above). The persisting problem is the inexistence of a specific convention prohibiting such activity, probably for the simple reasons that governments are not ready to give up such a useful and resourceful information gathering activity.

In fact, the right of belligerents to employ spies is today accepted as a legitimate ruse of war. 'The

[51] L.S. Edmondson, *supra* note 15, at 435.

[52] Q. Wright, *supra* note 4, at 12. See also L.S. Edmondson, *supra* note 15, at 436.

employment of spies is no offence against the laws of war, and it gives to the enemy no cause of complaint. The matter is therefore narrowed down to simply a question of right between the general and the spy he employs."[53] In addition to that rule of "ruse of war", to make use of the treason of enemy soldiers or private enemy subjects, whether they were bribed, or offered the information voluntarily and gratuitously is considered lawful[54].

In summary, "[a]s war prevails over sovereignty, the peacetime prohibition of espionage in national spaces does not apply between belligerent states, and the permissibility of espionage extends to all areas of hostilities, land, sea and air, whether national or international."[55]

The Regulations Respecting the Laws and Customs of War on Land, in the Section two (Hostilities) of the Chapter one (Means of Injuring the Enemy, Sieges, and Bombardments), the regulations set, in article 24, that "[r]uses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible."[56] This Article does not provide for any exception to this general rule of "ruses of war", and thus it does not impose any restriction on espionage in war.

At present, the rules of espionage, under the law of war in general, including the concept of legitimate ruse of war, and the Hague Regulations in particular, are useless either to secure state secrets or to preserve minimal human rights where sensitive information is involved.

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[53] H.W. Halleck, supra note 30, at 593.

[54] L. Oppenheim, *supra* note 18, at 422.

[55] J. Kish, *International Law and Espionage* (1995), 123.

[56] World War I Document Archive, *supra* note 13.

Finally, since the international law of war also regulates the legal statute of prisoners of war, including spies, special rules have been formulated to regulate the acquisition of information from prisoners of war. The international protection of prisoner of war thus imposes restrictions on belligerent intelligence activities[57]. General principles of international law prohibit forced information gathering from prisoner of war. But, as we have seen before, nothing prohibits a prisoner or a traitor to voluntarily and gratuitously give information to the enemy state.

4. PEACETIME ESPIONAGE

In the law of peace, the territorial division of the regulation is based on the distinction between national spaces and international spaces. The principle of sovereign equality, discussed above in Chapter one (The Doctrine of Non-Intervention in Internal Affairs), therefore applies and makes illegal any intervention violating that state' s national spaces. A contemporary issue is to determine if the law of peace recognizes espionage and if yes, how does it deal with it. Very little has been said about it in the books. Espionage is still considered mainly as a term of art in law of war. "While espionage between belligerents is an accepted part of the law of war, espionage in time of peace is best described as unrecognized."[58]

"In time of peace [...] espionage and, in fact, any penetration of the territory of a state by agents of another state in violation of the local law, is also a violation of the rule of international law imposing a duty upon states to respect the territorial integrity and political independence of other states"[59], as discussed earlier in this paper. Also, there is no rule of international law prohibiting a state to punish

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[57] J. Kish, *supra* note 55, at 137.

[58] L.S. Edmondson, *supra* note 15, at 436.

[59] Q. Wright, *supra* note 4, at 12.

individuals engaging in espionage activities. In fact, it' s a matter of domestic law and thus it belongs to each state to define peacetime espionage.

The practice has developed to treat espionage in time of peace as a problem of municipal law. When a spy is caught conducting espionage activity, in time of peace, what usually happens is that the sending state denies any connection with the captured agent and let the domestic law of the victim state take care of the spy. Occasionally, espionage by diplomats or officials is subject to an exchange of notes between governments. While that kind of communication stays relatively hidden from the public and is, *prima facie*, relatively benign, we can easily understand that it can rapidly leads to serious tensions between two states in their political but also economic relations. Also, espionage in peacetime is today recognized, in some circumstances, as a conduct giving rise to international responsibilities.

Two good examples of espionage in time of peace happened, the first one to be discussed occurred in 1945 and the second one in 1960. They are the Gouzenko Case and the U-2 Incident.

4.1 THE GOUZENKO CASE

The crucial event regarding the Canadian national security policy of the post-Second World War period is the defection of Igor Gouzenko, a cipher clerk employed by the USSR in its Embassy in Ottawa. His revelations had a great impact on most of the Western democratic countries and influenced Canadian policies for the twenty years following his defection[60]. It' s on September 5, 1945, that Gouzenko took a number of secret documents from files within the Embassy, and handed

[60] R. French and A. Béliveau, *La GRC et la gestion de la sécurité nationale* (1979), 7, cited in J. Mellon, *supra* note 1, at 20.

them to the Canadian Government, revealing what he knew about the activities of the GRU[61] in Canada. That was the beginning of the Cold War.

Gouzenko alleged that the Soviet Government had inspired and directed a series of parallel and competing espionage organizations in Canada. But, while the Royal Canadian Mounted Police, then responsible for the Canadian intelligence service, was aware of the communist activities among unions, the Canadian Government realised that Soviet intelligence services were working on recruiting "members" for their organizations among ordinary civilians, military personnel, civil servants, research scientists and even parliamentary figures[62]. The principal objective was obviously to acquire nuclear information to develop their own arsenal[63].

Since the major part of the leakage of critical information was due to actual members of the Canadian Government, Ottawa took steps in order to establish a screening program within its government[64]:

> The origin of the security screening program can be traced back to World War I. In 1931, the RCMP began the fingerprinting and screening of Civil Service Commission (CSC) applicants and appointees. The program was placed on an official footing in Canada as a consequence of the revelations of Igor Gouzenko, the Soviet cipher clerk who defected from the Russian Embassy in Ottawa in September 1945. The allegations of Soviet espionage prompted the Canadian government to initiate a Royal Commission under Supreme Court Justices R.L. Kellock and Robert

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[61] The *Glavnoye Razvedyvatel' noye Upravleniye* is "the main intelligence directorate of the General Staff. The GRU is responsible for military intelligence and electronic intercepts."; J.E. Tunnell, *Latest Intelligence: An International Directory of Codes Used by Governement, Law Enforcement, Military, and Surveillance Agencies* (1990) 101.

[62] J. Mellon, *supra* note 1, at 21. See also M. Cohen, "Espionage and Immunity: Some Recent Problems and Developments" (1948) *British Yearbook of International Law* 404, at 406.

[63] N. Lester, *Enquêtes sur les services secrets* (1998), 112, cited in J. Mellon, supra note 1, 21.

[64] Canadian Security Intelligence Service, (visited on November 24, 1999), Commentary No. 76: The Canadian Government Security Screening Program, [Online], URL: http://www.csis-scrs.gc.ca/eng/comment/com76e.html

> Taschereau.
> The report of the Royal Commission contained recommendations for the implementation of coordinated and uniform security measures across government. As an outcome of the findings, a Cabinet Directive was issued in 1948, formalizing security screening.

From the point of view of international law, the Report asked the question as to "what were to be the legal consequences of an act by one state, through certain of its accredited agents, which was designed, through obtaining confidential information, to undermine the security of a friendly host state."[65]

Canada reacted not by stopping diplomatic relations with USSR, but heads of missions were withdrawn, and the recall of unacceptable Embassy personnel in Ottawa was requested. Never did Canada claim for reparation in that case. It could have been different if the two states have been contiguous and of relative equality of strength. There was no rule of customary international law dealing with peacetime espionage that might have provided a legal basis for a prosecution in a municipal court. Also, it is important to note that the Soviet Government virtually admitted all the facts as alleged[66].

4.2 THE U-2 INCIDENT

On May 1, 1960, the aviator Francis Powers was arrested by Soviet authorities while he was conducting espionage over Soviet territory, flying a U-2 special plane, designed to avoid being detected.

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[65] M. Cohen, *supra* note 62, at 406.

[66] For a comprehensive study of that specific case, see M. Cohen, *supra* note 62, at 406 to 414.

Although Powers was an agent of the United States, he was not lawfully within Soviet territory, and so was not entitled to any immunity under international law. The particularity of that case is the double responsibility engaged by both the state and the agent. American President Eisenhower acknowledged his state' s responsibility and therefore gave the USSR grounds for official protest.

In that case, only the violation of airspace has been argued by the Soviet Government to prove a breach of international obligation by the United States. The Attorney General Roudenko argued the principle of sovereign equality and inviolability of airspace but never did he argue that espionage was violating an international rule. However, he used the espionage conducted by the United States in order to give a more dramatic look at his protest[67]. Also, '[t]he Soviet response was not in terms of the legality of espionage, but rather that aerial espionage was especially dangerous to world order since armed and unarmed aircraft were indistinguishable on radar."[68]

In his article, Quincy Wright lists the five conditions that the United States claimed to be justifying peacetime espionage[69]:

(1) a general practice of espionage by all states,

(2) the necessity for self-defence,

(3) the necessity to maintain the balance of power,

(4) the unreasonableness of Soviet objection in view of its own espionage activities, and

(5) the virtue of espionage or other types of intervention against communism.

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[67] G. Cohen-Jonathan and R. Kovar, *supra* note 10, at 246.

[68] L.S. Edmondson, *supra* note 15, at 448.

[69] Q. Wright, *supra* note 4, at 16. Each of these five justifications are given consideration in the following pages.

That case illustrates that "international law may be restructuring the rules relating to espionage on the degree of toleration and the type of permissible response to particular conduct."[70]

CONCLUSION

Espionage is an area of state activity which is vital to international relations and that is coming to assume increasing importance in the "New World Order". It' s therefore curious to realize that such a controversial and hot issue is unregulated by international law.

Also, the new technologies and the advancement of science as well as the globalization of world trade are new data making espionage a wider and more global activity than what governments were used to at the beginning of the 20th century will references only to espionage between belligerents in time of war. Today, economic espionage is, with military and diplomatic espionage, part of the objective of intelligence services.

Today, states do not appear to be inclined to consider complete prohibition espionage as a judicial obligation. In fact, within the current international relations, dominated by the "balance of terror", espionage is seen by many as being a necessary evil[71].

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[70] L.S. Edmondson, *supra* note 15, at 448.

[71] G. Cohen-Jonathan and R. Kovar, *supra* note 10, at 253.

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