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Espionage in International Law

LT. COL. GEOFFREY B. DEMAREST*

I. INTRODUCTION

The development of international legal principles regarding peacetime espionage has lagged behind changes in international intelligence gathering norms and practices. For example, intelligence activities are now accepted as a common, even inherent, attribute of the modern state. Moreover, the success of international peace operations, and the positive contribution of non-governmental organizations to conflict resolution often depend upon timely, accurate intelligence. Accordingly, international law might better reflect an updated appraisal of peacetime intelligence activities. In an age that calls for increasing public knowledge of the world's diplomatic, military and criminal condition, international jurists should reconsider the identity and the fate of individuals accused of spying. International law regarding peacetime espionage is virtually unstated, and thus, international law has been an inappropriate and inadequate reference for either condemnation or justification of actions involving intelligence gathering.

The fact that the intelligence function is an essential part of any policy or decision making process is axiomatic. Writers who have focused on international themes note that for an international organization to maintain authority in its decisions and policies, it must have access to good intelligence.¹ The intelligence gathering activities of

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The views expressed in this article are those of the author and do not reflect the official policy or position of the Department of Defense or the United States Government.

1. See, e.g., Myres McDougal, et al., *The Intelligence Function and World Public*

international organizations, however, generate ethical and practical problems similar to those caused by the efforts of nation states. There is an inevitable tendency to measure the relative moral value of ends versus means within the context of limited intelligence budgets. Yet law relevant to the negligent loss, betrayal, theft, or collection of information by international and transnational organizations barely exists. Accordingly, jurists interested in promoting the legal reach of public international organizations should establish sound legal and ethical guidance. To this end, the American experience can serve as an example, due to the high level of public scrutiny focussed on the American national intelligence regime.²

In its broadest sense, intelligence is knowledge. The term cannot be stretched to mean all knowledge, but intelligence is, at least, that knowledge which relates to a decision-making process.³ Supposedly,

Order, 46 TEMPLE L. Q. 365, 367-70 (1973). "Broadly conceived, intelligence is concerned with knowledge: statements and propositions which have been confirmed by experience, to which a degree of probability can be assigned." *Id.* This separates the intelligence function into three key sequential phases: (1) gathering, (2) processing, and (3) dissemination. "Each phase is divisible into numerous components. Processing, for example, includes assembling, coding, storing, decoding, retrieving, interpreting and planning." *Id.* at 368. The United States Central Intelligence Agency describes the intelligence function as a cycle of five steps: (1) Planning and Direction, (2) Collection, (3) Processing, (4) Analysis and Production, and (5) Dissemination. CENTRAL INTELLIGENCE AGENCY PUBLIC AFFAIRS, FACTBOOK ON INTELLIGENCE 14 (1993).

2. See, e.g., FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES: FOREIGN AND MILITARY INTELLIGENCE, BOOK I, S. REP. No. 755, 94th Cong., 2d Sess. 31-40 (1976) [hereinafter FINAL REPORT OF THE SELECT COMMITTEE]. For a comprehensive listing of relevant statutes and executive orders see PERMANENT SELECT COMMITTEE ON INTELLIGENCE OF THE HOUSE OF REPRESENTATIVES, COMPILATION OF INTELLIGENCE LAWS AND RELATED LAWS AND EXECUTIVE ORDERS OF INTEREST TO THE NATIONAL INTELLIGENCE COMMUNITY (1993); LAWS RELATING TO ESPIONAGE, SABOTAGE, ETC. (Gilman G. Udeh ed., 1976). For references across the broad range of intelligence related topics see NEAL H. PETERSEN, AMERICAN INTELLIGENCE, 1775-1990: A BIBLIOGRAPHIC GUIDE (1992); BIBLIOGRAPHY OF INTELLIGENCE LITERATURE (Walter Pforzheimer ed., 1985); PAUL W. BLACKSTOCK & FRANK L. SCHAF, JR., INTELLIGENCE, ESPIONAGE, COUNTERESPIONAGE, AND COVERT OPERATIONS: A GUIDE TO INFORMATION SOURCES (1978).

3. In its recruiting literature, the United States Central Intelligence Agency has defined intelligence as follows:

Intelligence is information-information about adversaries and potential adversaries that nations gather to formulate their foreign and security policies.

CENTRAL INTELLIGENCE AGENCY OFFICE OF PERSONNEL, CENTRAL INTELLIGENCE AGENCY 3 (1993).

In international affairs Intelligence is knowledge-fact and estimate The London Economist defined intelligence this way: 'Modern intelligence has to do with the painstaking collection and analysis of fact, the exercise of judgment, and clear and quick presentation. It is not simply what serious journalists would always produce if they had time; it is something more rigorous, continuous, and above all operational . . . that

intelligence differs from mere information because of its value against a specific decisional goal.

Intelligence officers describe their effort as a cyclical endeavor consisting of planning, collection, processing, and dissemination; they use a cycle metaphor to suggest the continuity of the steps and the impact of each step on the others. Any part of the cycle could be called 'espionage', and the intelligence analyst, briefer, or collection planner might each claim membership in the espionage establishment.⁴ At present, however, this is not the case. Espionage, within its more specific, limited meaning, is human information collection.⁵ Although the analyst may produce significant intelligence via creative scientific method, analysis is not spying. Similarly, intelligence planners may act as key a motivator of espionage-related activities, determining information priorities, and managing available methods for obtaining

is to say, related to something that somebody wants to do or may be forced to do.'

CENTRAL INTELLIGENCE AGENCY OFFICE OF PERSONNEL, CENTRAL INTELLIGENCE AGENCY 2 (1976). Sherman Kent, a pioneer writer on United States national intelligence, distinguished "strategic" intelligence from "operational," "tactical" or "combat" intelligence. These latter forms are the primary military types involving activities such as order-of-battle analysis and tactical surveillance while strategic intelligence, says Kent, is the "knowledge upon which we base our high-level national policy towards other states of the world." SHERMAN KENT, STRATEGIC INTELLIGENCE FOR AMERICAN WORLD POLICY 3 (1949). Although Kent's differentiations are valid today, the various intelligence forms, whether categorized as "strategic," "counter," "tactical," "domestic," or otherwise, are strongly interrelated and overlap in history, theory, operation, and purpose; In a recent analysis of the American government intelligence industry, Jennifer Sims states that "Intelligence is best defined as information collected, organized, or analyzed on behalf of actors or decision makers." U.S. INTELLIGENCE AT THE CROSSROADS: AGENDAS FOR REFORM 4 (Roy Godson et al. eds, 1995). Abram Shulsky calls this definition overly broad and argues that secrecy is the essential element of intelligence that distinguishes it from other policy-relevant information. *Id.* at 17.

4. See generally WILLIAM V. KENNEDY, INTELLIGENCE WARFARE: TODAY'S ADVANCED TECHNOLOGY CONFLICT (1983); DAVID WISE, & THOMAS B. ROSS, THE ESPIONAGE ESTABLISHMENT (1967). Many writers use espionage in a relatively inclusive manner. For instance, Rhodri Jeffreys-Jones defined espionage as "the process of acquiring information in the interest of national security" RHODRI JEFFREYS-JONES, AMERICAN ESPIONAGE 4 (1977). However, Jeffreys-Jones concedes, citing Harry H. Ransom, that the idea of espionage has been loosely expanded in common misuse to include even covert and paramilitary operations. *Id.* at 3. According to traditional definition, "Spies are secret agents of a state sent abroad for the purpose of obtaining clandestinely information in regard to military or political secrets." LASSA OPPENHEIM, INTERNATIONAL LAW 510-11 (2d ed. 1912). For some intelligence experts, the notion of what constitutes a spy is more limited. "It is well to keep in mind that not all secret agents are spies. They may on the other hand be spy catchers, or 'plants,' to uncover disaffection or subversion, sometimes in surprisingly high places. Or they may be saboteurs, or code snatchers, or function in a number of other ways." ALLISON IND, A SHORT HISTORY OF ESPIONAGE 2 (1963).

5. Espionage and spying are virtually synonymous, and the terms are so considered throughout this article.

the information—but they are not spies for so doing. Dissemination of information and media influencing may be so tied to some espionage activities that distinguishing between the two may be dysfunctional or disingenuous. Nevertheless, for the most part, the dissemination step of the intelligence cycle can also be logically separated from espionage in its limited sense.

Human Intelligence (HUM-INT) serves as the broadest category and thus, subsumes many human collection efforts that are not properly considered espionage. For example, the gleaning of information from Cuban or Bosnian refugees, newspaper accounts of reporters' interviews, or observations by diplomatic personnel may be HUM-INT, but not espionage. Intelligence collection encompasses more than the products of human agents. For example, intelligence collection equally includes Signals Intelligence (SIGINT), Measurement and Signature Intelligence (MAZ-INT), Photo or Imagery Intelligence (IM-INT), and a host of other "-INTs."⁶

Throughout history, the terms "espionage" and "spying" have carried varying amounts of pejorative baggage.⁷ Therefore, any attempt at a precise definition is difficult. In the first instance, authors of popular literature apply both terms to devices such as satellites, aircraft, or almost any object associated with intelligence collection.⁸ Human spies have enjoyed a special place in fictional and nonfictional

6. See JAMES BAMFORD, *THE PUZZLE PALACE* (1982); two major works on the related subject of cryptography are HERBERT O. YARDLEY, *THE AMERICAN BLACK CHAMBER* (1931); DAVID KAHN, *THE CODEBREAKERS* (1967); For information on IMINT and SIGINT support to international arms control and verification see *INTELLIGENCE IN THE ARMS CONTROL PROCESS: LESSONS FROM INF* (Catherine Kelleher & Joseph Naftzinger eds., 1990); BHUPENDRA JASANI, *SATELLITES FOR ARMS CONTROL AND CRISIS MONITORING* (1986); STAFF OF SENATE SELECT COMM. ON INTELLIGENCE, 96TH CONG., 1ST SESS., *PRINCIPAL FINDINGS ON THE CAPABILITIES OF THE UNITED STATES TO MONITOR THE SALT II TREATY 1* (Comm. Print 1979); Ted Greenwood, *Reconnaissance, Surveillance and Arms Control* (London International Institute for Strategic Studies Adelphi Paper No. 88, 1972).

7. General Harry Halleck, contemporary of Francis Lieber and acknowledged scholar of international law during the American Civil War era, quotes Emmerich de Vattel on the question of whether a government may compel an act of spying:

Spies are generally condemned to capital punishment, and not unjustly; since we have scarcely any other means of guarding against the mischief they may do us. For this reason, a man of honor, who would not expose himself to die by the hand of a common executioner, ever declines serving as a spy. He considers it beneath him, as seldom can be done without some kind of treachery.

HENRY W. HALLECK, *INTERNATIONAL LAW* 406 (1861). It is the *disguise*, or *false pretense*, which constitutes the perfidy, and forms the essential elements of the crime, which, by the laws of war, is punishable with an ignominious death. *Id.* at 407.

8. See, e.g., DICK VAN DER AART, *AERIAL ESPIONAGE* (1986); JOHN M. CARROLL, *SECRETS OF ELECTRONIC ESPIONAGE* (1966); Morton H. Halperin, *NSA Spying—Most Secret Agents*, 173 *NEW REPUBLIC* 12 (1975); *The Beep, Blink and Thrum of Spy Gadgets*, *NEWSWEEK*, Nov. 22, 1978, at 55.

writing, especially in the twentieth century.⁹ Novelists create images of spies that reflect the ethical paradoxes and curious legal trade offs that are seemingly an inherent condition of the industry.¹⁰ On one hand, secret agents possess a romantic mystique of international intrigue, competence, and potency. Their activities, on the other hand, at times debase human trust. "The gravamen of the offense of a spy is the treachery of deception practiced, the being in disguise or acting under false pretense."¹¹ At any rate, whether in fiction or reality, the individual who spies is not constantly skulking. He or she usually has another occupation and spies only part-time.¹² As such, a practical definition of espionage, must revolve more around the act of spying rather than around the office of the individual.

What attributes are common to spies in the act of spying? English historian Michael Burn outlined the salient characteristics as follows:

1. He is deliberately involved in the conveying of information about people or things recently observed.
2. He acquires or sends it secretly.
3. The information he seeks or conveys is for the use of people hostile to or suspicious of those it is about, and it is usually for and about people in government positions, or thought to be threatening to a Government.
4. He is consciously a deceiver.¹³

Burn's description of a spy serves as a useful starting point for establishing an international legal definition. Accordingly, espionage can be defined as the consciously deceitful collection of information, ordered

9. See generally J.J. Macintosh, *Ethics and Spy Fiction*, in *SPY FICTION, SPY FILMS AND REAL INTELLIGENCE* (Wesley K. Wark ed., 1991) at 161; G. Rausch & D. Rausch, *Developments in Espionage Fiction*, 10 KAN. Q. 71 (1978); J. Barzun, *Meditations on the Literature of Spying*, 34 AM. SCHOLAR 167 (1965); David H. Hunter, *The Evolution of Literature on United States Intelligence*, 5 ARMED FORCES & SOC. 31 (1978).

10. Barzun quips, "The spy story does this for us, then: it permits us not to choose, we can live high and lie low." Barzun, *supra* note 9, at 168. "The advantage of being a spy as of being a soldier is that there is always a larger reason — the reason of state — for making a little scruple or nastiness shrink into insignificance." *Id.* at 169.

11. HARRY HALLECK, *INTERNATIONAL LAW* 406 (4th Eng. ed. 1908); see also CHARLES G. FENWICK, *INTERNATIONAL LAW* 477 (2d ed. 1934); MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* 559 (1961).

12. For a brief description of the use of "cover" by the United States CIA, see HARRY ROSITZKE, *THE CIA'S SECRET OPERATIONS* 213 (1977). There exist obvious categories of persons who by the nature of their official employment deserve special mention, e.g., embassy populations. See Maxwell Cohen, *Espionage and Immunity: Some Recent Problems and Developments*, 25 BRIT. Y.B. INT'L L. 404, 408 (1948); Nathaniel P. Ward, *Espionage and the Forfeiture of Diplomatic Immunity*, 11 INT'L. 657 (1977).

13. MICHAEL BURN, *THE DEBATABLE LAND: A STUDY OF THE MOTIVES OF SPIES IN TWO AGES* 2 (1970).

by a government or organization hostile to or suspicious of those the information concerns, accomplished by humans unauthorized by the target to do the collecting.

In line with the above legal definition, activities such as analysis, planning, or processing should be excluded from any definition of espionage. These activities lack the requisite conscious, deliberate manner. Burn's definition excludes people who are drawn into spying unknowingly. For example, "a diplomatic courier often carries secret and hostile intelligence. This he knows, but so do the enemy; he is not a spy. But a man certainly involves himself in espionage who conveys or collects intelligence while pretending to be doing something else."¹⁴ Moreover, an element of hostility towards the interests of the collection target must also be present;¹⁵ since the motives of the organization directing or encouraging collection are implicated by the hostility requirement. Nevertheless, although these motives may be difficult to determine and prove, it is a common condition of nations to be suspicious of their neighbors.¹⁶

14. *Id.*

15. Definitions found in national espionage statutes reflect these elements of personal deceit and harm to a nation. *E.g.*, Article 2 of the *Law on Criminal Responsibility for State Crimes* (of the Soviet Union) which provided as follows:

Espionage

The giving away, theft or collection with the intention of conveying to a foreign Power, a foreign organization, or their agents, of information constituting a State or military secret, as well as the giving away or collection on the instructions of foreign intelligence agencies of other information to be used against the interests of the U.S.S.R., if the espionage is committed by a foreigner or by a stateless person—is punishable by deprivation of liberty for a period of from seven to fifteen years with confiscation of property, or by death and confiscation of property.

30 I.L.R. 73 (Powers Case, 1960). Note that this Soviet statute provided a possible death sentence and reflects the importance of use of the information by an extra-national organization; United States statutes do not define peacetime espionage or spying, but the Espionage Act prohibits specific acts. 18 U.S.C. §§ 792-799 (1983). Section 793 of the Act prohibits gathering, transmitting or losing defense information. The section requires intent or reason to believe on the part of the collector that the information would be used to the injury of the United States. Section 794 of the Espionage Act, dealing with the gathering or delivering of defense information to aid a foreign government or other organization, provides for a possible death penalty for violations. 18 U.S.C. § 794 (1983). Section 796 prohibits the use of aircraft for photographing defense installations. Significantly, the penalty for violation of the prohibition of photographing defense installations is far less severe — a fine of not more than \$1000 or imprisonment of not more than one year, or both. 18 U.S.C. § 796 (1983). Wartime spying is covered by article 106 of the Uniform Code of Military Justice and is codified in Title 10 U.S. Code. The Codes allow the death penalty to be imposed. 10 U.S.C. § 906 (1982).

16. Hugo Grotius' enlightening comment is: "And yet, in other things [such as spying] those who avail themselves of the aid of bad men against an enemy are thought to sin before God, but not before men; that is, they are thought not to commit wrong against the law of nations, because in such cases—custom has brought law beneath its sway; and 'to deceive' as Pliny says, 'in the light of the

Burn's analysis suggests that collection targets include governments, or parts thereof, other organizations, or individuals. This recognition is significant because the intelligence targets of international organizations may likewise be nation state governments or other organizations.

Burn also inspects the particular motives for spying by dividing such activity into the following four categories:

- (1) The espionage one government practices against another.
- (2) The espionage used to defeat this.
- (3) The secret watch a government keeps on its own people.
- (4) The secret watch some of its people keep upon the government.¹⁷

These categories are not as distinct as Burn's analysis suggests; instead, they overlap and interact. Nevertheless, Burn's organization facilitates the examination of terms closely related to espionage.

Burn's second category, espionage used to defeat the espionage one government practices against another, is better called counterespionage, a subtype of counterintelligence.¹⁸ Counterespionage, a common specialty found practiced by intelligence organizations worldwide,¹⁹ can be active or passive, and designed to prevent, confuse, or alter hostile intelligence development. Counterespionage is the "spy versus spy" work of countering clandestine human intelligence collection, but fits outside the definition of espionage offered earlier. Counterspies are supported by the sense of high purpose spies use to hurdle municipal legal barriers and garden variety ethical standards. This Machiavellianism is further fueled by fear, a sense of urgency, and spreading distrust that often first claims ethics as a victim. Consequently, international legal prescriptions addressing espionage should similarly consider counterespionage. However, counterespionage is not the subject of this essay.

practices of the age, is prudence.' HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* (1625), reprinted in LEON FRIEDMAN, 1 *THE LAW OF WAR: A DOCUMENTARY HISTORY* 39, 40 (1972) [hereinafter FRIEDMAN].

17. BURN, *supra* note 13, at 3.

18. "Counterintelligence (CI) is a special form of intelligence activity, separate and distinct from other disciplines. Its purpose is to discover hostile foreign intelligence operations and destroy their effectiveness." FINAL REPORT TO THE SELECT COMMITTEE, *supra* note 2, at 163; See generally PETERSEN, *supra* note 2; George Kalaris et al., *Counterintelligence*, in INTELLIGENCE REQUIREMENTS FOR THE 1990'S 128 (Roy Godson ed., 1989); BLACKSTOCK & SCHAF JR., *supra* note 2, at ch. 15.

19. See ALLISON IND, *supra* note 4, at 15; see generally RICHARD W. ROWAN, *THE STORY OF SECRET SERVICE* (1937). Rowan's classic work was updated by the addition of 12 chapters (to 94) with the help of Robert Deindorfer in 1967. See also R. ROWAN & R. DEINDORFER, *SECRET SERVICE: THIRTY-THREE CENTURIES OF ESPIONAGE* (1967). See also R. ROWAN, *SPY AND COUNTERSPY* (1928); BLACKSTOCK & SCHAF JR., *supra* note 2, at 179; For readable accounts of counterespionage events, see ALLEN DULLES, *GREAT TRUE SPY STORIES* chs. 3 & 4 (1968).

Burn's third category, the secret watch a government keeps on its own people, addresses domestic surveillance. This issue has been exhaustively considered in the American context since allegations and revelations of intelligence abuses during the 1960s and 1970s.²⁰ This form of "spying" infringes on the individual rights of a society's members, but depending upon the internal and external threats to a polity, some domestic surveillance is justified.²¹ Although important, the spying of a government against its members is not examined in the present analysis.²²

Burn's fourth category is "[t]he secret watch some of a government's people keep upon the government." At its extreme, this category of spying evokes a crime closely related to espionage: treason.²³ Treason, a statutory crime in most countries, typically involves the conscious transmittal of information to another country's agents or spies by a citizen of the target country.²⁴ The information conveyed usually must have some importance to national security.²⁵ Spying and treason have a curious relationship.²⁶ A key activity of traditional espionage is what amounts to the recruitment and development of traitors, and, although a traitor also may be a spy, the traitor aspect will earn greater disrespect and loathing. The contempt accorded to the traitor results from the perceived breach of duty to one's country — a duty the foreign spy owes elsewhere. As can be seen, treason is somewhat different to espionage.

20. See, e.g., the description of operation COINTELPRO in FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, BOOK II: INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 755, 94th Cong., 2d Sess. (1976); FINAL REPORT, BOOK III: SUPPLEMENTARY DETAILED STAFF REPORTS ON INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 755, 94th Cong., 2d Sess. (1976); see generally THE INTELLIGENCE COMMUNITY, PUBLIC DOCUMENT SERIES 389 (Tyrus G. Fain ed., 1977); see also CHARLES D. AMERINGER, U.S. FOREIGN INTELLIGENCE 332-66 *passim* (1990).

21. For a generalized debate on control of intelligence activities by the United States government, see *Congressional Oversight of Intelligence Operations*, 82 AMER. SOC. INT'L L. PROC. 21 (1988) (a report by a panel chaired by William G. Miller); American Bar Association, OVERSIGHT AND ACCOUNTABILITY OF THE UNITED STATES INTELLIGENCE AGENCIES: AN EVALUATION (1985) (a report by the Working Group on Intelligence Oversight and Accountability, Task Force on Intelligence and Counterintelligence, Daniel B. Silver, Chairman).

22. FINAL REPORT OF THE SELECT COMMITTEE, *supra* note 2, at 196.

23. Under the United States Constitution there are two forms of treason: (1) Levying war against the United States and (2) Adhering to the enemies of the United States, giving them aid and comfort. U.S. CONST. art. III, sec. 3; the essence of the crime of treason is the "breach of national allegiance." Hayes McKinney, *Spies and Traitors*, 12 ILL. L. REV. 591, 612 (1918).

24. *Supra* note 15.

25. *Id.*

26. For a philosophical and historical analysis of this phenomenon see CHAPMAN PINCHER, *TRAITORS: THE ANATOMY OF TREASON* (1987).

Spies are easily distinguished from traitors — not by personal characteristics, methods, or motives — but rather by their sponsors and their personal status or affiliations prior to the act of spying. Sensitive to the negative connotations of the word “spy,” professional intelligence services deny using spies in the conduct of human intelligence collection. Instead, persons involved in field human intelligence gathering are called “agents” or perhaps “case officers.”²⁷ A case officer might recruit individuals with access to wanted information or seek to develop confidences that eventually gain personal access to closely held information. When a case officer recruits a local citizen, even the local citizen will not be referred to as a “spy,” but rather as an “agent,” “contact,” or “source.” Whatever the case officer is called, he or she may be engaged in espionage. The activities of the recruited national, however, may constitute both espionage and treason.

Burn's analysis does not include covert action, a controversial enterprise of intelligence organizations that goes beyond intelligence collection.²⁸ Contemporary discussion of covert action broadened after public revelations of activities by American intelligence organizations,

27. Historian Michael Burn states,

A convention has developed among historians, according to which the gentlemen are called 'secret agents' and only the players spies, the difference depending upon whether or not a Person does it for a livelihood, (Professional spies, however, writing about themselves, speak of themselves as 'agents'). There seems to be a wish to avoid the stench of what is still a nasty word.

BURN, *supra* note 13, at 3.

The Directorate of Operations (DO) — the Clandestine Service — is a very special part of the CIA. It is made up of men and women who are dedicated to seeking information vital to the security of our country and people.

This is a secret service with its own specialized way of recruiting, training, and maintaining networks of human agents—some might call them spies—to collect information about events and issues that threaten or might be potentially harmful to our country.

CENTRAL INTELLIGENCE AGENCY, *supra* note 3, at 9.

28. See generally Richard H. Shultz, Jr. et al., *Covert Action, in INTELLIGENCE REQUIREMENTS FOR THE 1990S* 165 (Roy Godson ed., 1989); BLACKSTOCK & SCHAF JR., *supra* note 2, at 189; Loch K. Johnson, *On Drawing a Bright Line for Covert Operations*, 86 AM. J. INT'L L. 784 (1992); Lori F. Damrosch, *Covert Operations*, 83 AM. J. INT'L L. 795 (1989); see also Richard A. Falk, *CIA Covert Actions and International Law*, 12 SOC'Y 39-44 (1975); Barrie Masters, *The Ethics of Intelligence Activities*, 24 NAT'L SECURITY AFFAIRS FORUM 39 (1976); E. Drexel Godfrey Jr., *Ethics and Intelligence*, 56 FOR AFF 624-42 (1978); Harry Ransom, *The Uses (and Abuses) of Secret Power*, 52 FOR SERV J 15-18, 29-30 (1975); *Intelligence Activities: Hearings Before the Senate Select Comm. to Study Governmental Operations with Respect to Intelligence Activities*, 94th Cong., 1st Sess. reprinted in 7 *Covert Action* (1975). The most extreme hostility to American CIA covert activities is perhaps manifested in PHILIP AGEE, *INSIDE THE COMPANY: CIA DIARY* (1975). It is complemented by DAVID A. PHILLIPS, *THE NIGHT WATCH* (1977). Both books deal with covert CIA activities in Latin America. Other works critical of United States covert operations include VICTOR MARCHETTI & JOHN MARKS, *THE CIA AND THE CULT OF INTELLIGENCE* (1974); JOSEPH B. SMITH, *PORTRAIT OF A COLD WARRIOR* (1976).

particularly concerning the Iran-Contra affair of the mid-1980s.²⁹ Critics of covert action argue that such activity constitutes an illegal interference with the internal affairs of a foreign government, and thus, a breach of Article 2 (4) of the United Nations Charter.³⁰ Pure covert action has no direct relationship to the intelligence function in decision making. Nevertheless, while covert action can be academically distinguished from human intelligence gathering, the two activities may be blurred in practice. Intelligence organizations conduct covert activities because of the inherent security of the organization, needed access to closely held information, and the less fettered command and control by executive decision makers. Covert action — whether legally supportable or insupportable when conducted — has a relationship to international legal proscription and mandates already defined by customary international law and the United Nations Charter. Some forms of covert action might bear similarity to the international legal definition of espionage; for example, the *modus operandi* of foreign secret agents interested in gathering intelligence information can include positive action. Nevertheless, covert action is not espionage, but some espionage activities may constitute covert action.

The key phrases of the foregoing paragraphs (covert action, treason, domestic surveillance, and counterespionage) were used to frame and distinguish espionage. This vocabulary, along with related terms such as sedition, subversion, and sabotage, faces further problems of interpretation outside English language usage. Words used to describe clandestine activities can be tortured in translation due to imperfect cognates and differing connotative traditions. For instance, *sedición* may not mean for the Argentine what sedition means for the North American.

II. INTERNATIONAL ESPIONAGE LAW

International law has long addressed the issue of espionage during times of war while peacetime espionage has remained undressed. Rather, peacetime espionage has always been seen as an issue of domestic law, even though an international event is obviously involved. Consequently, the existing laws of war are a valid starting point for international juridical treatment of peacetime intelligence. Principles regarding spying in the laws of war are unique, clear and consistent. As such, the laws of war provide a compass for navigating the ethical dilemmas involving human rights, sovereignty, and global security that human intelligence collection entails.

29. *Id.* See also IRAN-CONTRA AFFAIR, H.R. REP. NO. 100-433, S. REP. NO. 100-216, 100th Cong., 1st Sess. (1988); PETERSEN, *supra* note 2, at 322.

30. UN CHARTER art. 2, para. 4.

The following survey of the laws of war adduces, as historian Burn deduced, that personal deceit, whether in war or during peace, remains the essential element of spying. The difficulty of defending such deceit continues to serve as the justification for allowing the most severe punishments. Nevertheless, according to the traditional viewpoint, human intelligence gathering *per se* is not an illegal activity.

Hugo Grotius' seventeenth century summation of the international law relating to spying provides a logical starting point for the international legal history of espionage. Grotius states:

[S]pies, whose sending is beyond doubt permitted by the law of nations — such as the spies whom Moses sent out, or Joshua himself — if caught are usually treated most severely. "It is customary," says Appian, "to kill spies." Sometimes they are treated with justice by those who clearly have a just case for carrying on war; by others, however, they are dealt with in accordance with that impunity which the law of war accords. If any are to be found who refuse to make use of the help of spies, when it is offered to them, their refusal must be attributed to their loftiness of mind and confidence in their power to act openly, not to their view of what is just or unjust.³¹

Grotius' comment on espionage, although nearly three hundred years old, is valid today. Accordingly, the law of nations permits the sending of spies, but if caught, spies are treated most severely.³² A fascinating legal paradox is apparent.³³ While some commentators claim the noxious spy commits the most serious crime against a government, there is no consensus that espionage is a crime outside of a municipal statutory sense.

One of the first modern codifications on the laws of war, the *Declaration of Brussels*, dedicated several articles to the problems of intelligence and espionage.³⁴ The *Declaration* stated that "stratagems (*rus-es de guerre*), and the employment of means necessary to procure intelligence respecting the enemy or the country (terrain) subject to the

31. HUGO GROTIUS, *THE LAW OF WAR AND PEACE*, Book III, ch. IV xviii 655 (F. Kelsey translation, Oxford, 1925).

32. DEPARTMENT OF THE ARMY, *THE LAW OF LAND WARFARE* 33 (1956); see Ward, *supra* note 11; but see, *Ex parte Quirin* 317 U.S. 31 (1942) (stating that espionage violates international law).

33. See Cohen, *supra* note 12, at 404; Maximilian Koessler, *The International Law on the Punishment of Belligerent Spies: A Legal Paradox*, 1958 CRIM. L. REV. 21.

34. *Declaration of Brussels Concerning the Laws and Customs of War* [hereinafter *Declaration of Brussels*] adopted by the Conference of Brussels, August 27, 1874. The Declaration can be found in FRIEDMAN, *supra* note 16, at 194-203, and in *THE LAWS OF ARMED CONFLICTS* 25-34 (Dietrich Schindler & Jiri Toman eds., 1973). The rules announced by the Declaration were not adopted by the participating powers. However, the Declaration of Brussel became a basis for the two Hague Conventions adopted in 1899 and 1907. *Id.* at 25.

provisions of Article XXXVI), are considered lawful means [of warfare].³⁵ Thus, even deceptive means of procuring intelligence were considered lawful. Nevertheless, the Brussels Declaration restricted treatment of spies by applying the laws only to war time situations. "No one shall be considered as a spy but those who, acting secretly or under false pretenses, collect, or try to collect, information in districts occupied by the enemy with the intention of communicating it to the opposing force."³⁶ The central aspects of the *Brussels Declaration* definition, false pretenses, collection of information and intention to communicate the information to an opposing force, are very similar to Burn's outline. The *Declaration* states,

A spy if taken in the act shall be tried and treated according to the laws in force in the army which captures him³⁷. . . If a spy who rejoins the army to which he belongs is subsequently captured by the enemy, he is to be treated as a prisoner of war, and incurs no responsibility for his previous acts.³⁸

This is a very flexible statute of limitations. If a spy returns to his own army, he is not liable for his acts on subsequent capture. Such a provision would be difficult to understand without first accepting the paradoxical nature of espionage. The law of war, while preserving the deterrence effect of capital punishment, and also easing the individual's fate, rewards success in spying.³⁹ A spy does not remain at large like other criminals, because espionage is considered a "noncrime crime." Once the actor has returned home, the spy is no longer a spy in the same way that a criminal remains so until capture.⁴⁰

The *Declaration* similarly restricted to whom the espionage label could be applied. Military men (*les militaires*) who have penetrated within the zone of operations of the enemy's army, with the intention of collecting information, are not considered as spies if it has been possible to recognize their military character. In like manner military men (and also nonmilitary persons carrying out their mission openly) charged with the transmission of despatches either to their own army or to that of the enemy, shall not be considered as spies if captured by the enemy.

35. *Declaration of Brussels*, art. 14, FRIEDMAN, *supra* note 16, at 197; see also SCHINDLER & TOMAN, *supra* note 34, at 29.

36. *Declaration of Brussels*, art. 19, FRIEDMAN, *supra* note 16, at 197; see also SCHINDLER & TOMAN, *supra* note 34, at 30.

37. *Declaration of Brussels*, art. 20, FRIEDMAN, *supra* note 16, at 197; see also SCHINDLER & TOMAN, *supra* note 34, at 30.

38. *Declaration of Brussels*, art. 21, FRIEDMAN, *supra* note 16, at 198; see also SCHINDLER & TOMAN, *supra* note 34, at 30.

39. See MCDUGAL & FELICIANO, *supra* note 11, at 559-60.

40. *Supra* note 38.

To this class belong, also, if captured, individuals sent in balloons to carry despatches, and generally to keep up communications between the different parts of an army, or of a territory.⁴¹

Although located in the laws of war, this provision can equally be applied to several peacetime situations. Transmitting dispatches is not a reason for considering a person a spy, nor should he be considered a spy if the nature of his activities is not hidden.

The *Lieber Code*, written eleven years prior to the *Brussels Declaration* as a general order for the Union Army during the American Civil War, is not a document of international law.⁴² However, the *Code* is significant due to its role as a primary model for the later Hague and Geneva agreements.⁴³ The *Code*, like the *Declaration*, underlines personal deceit or false pretenses as the essence of espionage, notes the serious threat espionage poses, and acknowledges the heavy penalties allowed. The *Code* permitted "scouts, or single soldiers, if disguised in the dress of the country or in the uniform of the army hostile to their own, employed in obtaining information, if found within or lurking about the lines of the captor . . . [to be] treated as spies, and suffer death."⁴⁴ Deceit in personal dealings was considered especially dangerous and justifying of exceptional deterrent measures. "While deception in war is admitted as a just and necessary means of hostility, and is consistent with honorable warfare, the common law of war allows even capital punishment for clandestine or treacherous attempts to injure an enemy, because they are so dangerous, and it is difficult to guard against them."⁴⁵ Personal human deception has been considered so dangerous as to allow capital punishment. Other provisions highlighting the low regard for personal deceit include one dealing with guides. "Guides, when it is clearly proved that they have

41. *Declaration of Brussels*, art. 22, FRIEDMAN, *supra* note 16, at 198; see also SCHINDLER & TOMAN, *supra* note 34, at 30.

42. Instructions for the Government of the Armies of the United States in the Field, prepared by Francis Lieber, promulgated as General Orders No. 100 by President Lincoln, 24 April, 1863, Adjutant Generals' Office, 1863, Washington 1898: Government Printing Office [hereinafter General Orders No. 100]. Can be found in FRIEDMAN, *supra* note 16, at 158; SCHINDLER & TOMAN, *supra* note 34, at 3. The Lieber Code is a significant ancestor and reference for the 1977 Protocols to the Geneva Conventions since it was written in the context of a conflict not of an international character. On this point see Daniel Smith, *New Protections for Victims of International Armed Conflicts: The Proposed Ratification of Protocol II by the United States*, 120 MIL. L. REV. 60 (1988).

43. SCHINDLER & TOMAN, Introductory note, *supra* note 34, at 3.

44. General Orders No. 100, art. 83, FRIEDMAN, *supra* note 16, at 173; see also SCHINDLER & TOMAN, *supra* note 34, at 14.

45. General Orders No. 100, art. 101, FRIEDMAN, *supra* note 16, at 176; see also SCHINDLER & TOMAN, *supra* note 34, at 16.

misled intentionally, may be put to death."⁴⁶ Another provision deals with abuse of a truce flag:

If it be discovered, and fairly proved, that a flag of truce has been abused for surreptitiously obtaining military knowledge, the bearer of the flag thus abusing his sacred character is deemed a spy.

So sacred is the character of a flag of truce, and so necessary is its sacredness, that while its abuse is an especially heinous offense, great caution is requisite, on the other hand, in convicting the bearer of a flag of truce as a spy.⁴⁷

The *Lieber Code* marked the beginning of the modern pattern of giving the spy considerable leeway after-the-fact, but very little leeway if caught in the act. "A successful spy or war-traitor, safely returned to his own army, and afterwards captured as an enemy, is not subject to punishment for his acts as a spy or war-traitor, but he may be held in closer custody as a person individually dangerous."⁴⁸

The 1899 Hague Rules differed slightly on the use of intelligence methods. "Ruses of war and the employment of methods necessary to obtain information about the enemy and the country, are considered allowable."⁴⁹ The 1907 Hague Rules, defining spies similar to the earlier Brussels document, remain the current law.⁵⁰ Again, the spy was not liable for previous acts of espionage once he rejoined the army to

46. General Orders No. 100, art. 97, FRIEDMAN, *supra* note 16, at 176; *see also* SCHINDLER & TOMAN, *supra* note 34, at 16.

47. General Orders No. 100, art. 114, FRIEDMAN, *supra* note 16, at 179-80; *see also* SCHINDLER & TOMAN, *supra* note 34, at 17-18.

48. General Orders No. 100, art. 104, FRIEDMAN, *supra* note 16, at 177; *see also* SCHINDLER & TOMAN, *supra* note 34, at 16.

49. *Final Act of the International Peace Conference*, signed at the Hague, 29 July 1899. The text can be found in FRIEDMAN, *supra* note 16, at 204; *see also* SCHINDLER & TOMAN, *supra* note 34, at 49. The Conference submitted for signature three conventions and three declarations. The Second Convention, relevant here, was titled *Convention Regarding the Laws and Customs of War on Land*. Schindler places the textual provisions of the 1899 Conference alongside parallel articles of the 1907 Hague agreements. An introductory note to the Second Convention begins on page 57 and the Convention text begins on page 65. The text of the Second Convention begins in Friedman at 221.

50. *Regulations Respecting the Laws and Customs of War on Land*, art. 24, annexed to the Convention [of 1899] *Regarding the Laws and Customs of War on Land*. FRIEDMAN, *supra* note 16, at 229; *see also* SCHINDLER & TOMAN, *supra* note 34, at 77. The wording of the 1907 Hague rules are essentially equivalent.

which he belonged.⁵¹ A spy was to be taken in the act only, and not punished without trial.⁵²

The Hague Rules of Air Warfare, signed in 1922, further defined when an individual would be considered a spy.⁵³

Any person on board a belligerent or neutral aircraft is to be deemed a spy only if acting clandestinely or on false pretenses he obtains or seeks to obtain, while in the air, information within belligerent jurisdiction or in the zone of operations of a belligerent with the intention of communicating it to the hostile party.⁵⁴ Acts of espionage committed after leaving the aircraft by members of the crew of an aircraft or by passengers transported by it are subject to the provisions of the Land Warfare Regulations.⁵⁵

The Rules do not address aerial observation, but rather address acts of personal espionage by individuals while aboard an aircraft. Hence the article addresses a jurisdictional question, not the mission of the aircraft.

51. Article 29 of the 1907 Hague Convention rules reads,

"A person can only be considered a spy when, acting clandestine or on false pretenses, he obtains or endeavours to obtain information in the zone of operations of a belligerent, 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 a 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 destined 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.

SCHINDLER & TOMAN, *supra* note 34, at 78; see also FRIEDMAN, *supra* note 16, at 319; Article 29, referencing spies, is one of the regulations annexed to the 1907 Convention as done in the 1899 Convention. The two versions differ only slightly. Many of the states which ratified the 1899 Convention did not ratify the 1907 version. They remain bound by the 1899 agreement. As between parties to the 1907 Convention, the 1899 agreement is replaced. Both agreements are considered as embodying rules of customary international law. As such they are also binding on states which are not formally parties to them. SCHINDLER & TOMAN, *supra* note 34, at 57.

52. *Convention Regarding the Laws and Customs of War on Land* (1907 Hague Convention), art. 30, FRIEDMAN, *supra* note 16, at 319; see also SCHINDLER & TOMAN, *supra* note 34, at 79.

53. The Hague Rules of Air Warfare, The Hague, Dec. 1922-Feb. 1923. The text can be found in FRIEDMAN, *supra* note 16, at 437; see also SCHINDLER & TOMAN, *supra* note 34, at 139.

54. The Hague Rules of Air Warfare, art. 27, FRIEDMAN, *supra* note 16, at 442; see also SCHINDLER & TOMAN, *supra* note 34, at 144.

55. The Hague Rules of Air Warfare, art. 28, *Id.*

The *Geneva Convention* of 1949, while doing little to change the law of war regarding espionage, employed additional procedural safeguards.⁵⁶ For example, in the case of protected persons accused of spying in occupied territory, the Convention allowed the occupying power to refuse the individual rights of communication otherwise granted under the Convention.⁵⁷ Furthermore, the Convention mandates trial with counsel, an appeal process after penalty is imposed, and a six-month waiting period before a death penalty can be carried out.⁵⁸ The six-month suspension of sentence can be reduced in grave emergencies.⁵⁹

The most recent attempt to advance the rules of warfare produced the *Geneva Protocols of 1977*.⁶⁰ These *Protocols* were intended to de-

56. Article 5 of Part I (General Provisions) of the *Convention Relative to the Protection of Civilian Persons in Time of War*, Aug. 12, 1949 (the 4th Geneva Convention) states,

Where in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.

FRIEDMAN, *supra* note 16, at 643; *see also* SCHINDLER & TOMAN, *supra* note 34, at 425.

57. *Convention on Protection of Civilian Persons*, art. 5, FRIEDMAN, *supra* note 16, at 643; *see also* SCHINDLER & TOMAN, *supra* note 34, at 425.

58. *Convention on Protection of Civilian Persons*, art. 75, FRIEDMAN, *supra* note 16, at 664-65; *see also* SCHINDLER & TOMAN, *supra* note 34, at 445.

59. The last paragraph of Article 75 reads,

The six months, period suspension of the death sentence herein prescribed may be reduced in individual cases in circumstances of grave emergency involving an organized threat to the security of the Occupying Power or its forces, provided always that the Protecting Power is notified of such reduction and is given reasonable time and opportunity to make representations to the competent occupying authorities in respect of such death sentences.

Convention on Protection of Civilian Persons, art. 75, FRIEDMAN, *supra* note 16, at 665; *see also* SCHINDLER & TOMAN, *supra* note 34, at 445. Thus, it is apparent that severe and summary punishment including death for the spy is easily permissible within the provisions of the Conventions.

60. *Protocols Additional of 8 June 1977 to the Geneva Conventions of 12 August*

velop and reaffirm the laws of war established at the earlier Hague and Geneva conferences. The *Protocols* update earlier agreements to take advantage of new medical and communication technologies and attempt more thorough inclusion of non-international conflicts.⁶¹ Specifically, Article 46 of Protocol I reaffirms the definition and treatment of spies as stated in Article 29 of the 1907 *Hague Convention*.⁶² Article 46 validates the present day use of the procedure for handling spies, which has been accepted by international law for more than 100 years.⁶³

A common thread running through both the law of war codifications and historical writings on international law is the negative connotation attending the word "spy." The war code's approach has been to identify persons who were not considered spies while stating nowhere that spying is a crime of nations. Instead, spying is accepted as a part of war, but is recognized as being so dangerous that

1949, Protocol I Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 16 I.L.M. 1391 (1977), reprinted in INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (1977) [hereinafter *Protocols Additional*]; Horace B. Robertson, Jr., *Changing Rules For Changing Forms of Warfare*, 42 LAW & CONTEMP. PROBS. 204 app. (1978); *Official Documents*, 72 AM. J. INT'L L. 457 (1972).

61. See generally, W. Thomas Mallison & Sally V. Mallison, *The Juridical Status of Privileged Combatants Under the Geneva Protocol of 1977 Concerning International Conflicts*, 42 LAW & CONTEMP. PROBS 4.

62. See *supra* note 51.

63. Art. 46, Protocol I of the Convention states:

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.

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.

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 pretense 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.

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.

Protocols Additional, art. 46 Protocol I, *supra* note 59 at 561.

capital punishment is allowed as a discouragement. The venerable rules of war do little to reconcile the paradoxical nature of espionage as a delict. As they are, the Rules may be most useful for development of international law regarding current peacetime intelligence collection practices.

Applying the laws of war as a preliminary guide to the legal handling of intelligence activities, it is evident that some means of intelligence gathering are considered to be in consonance with honorable conduct. The law of war takes the need to gather intelligence for granted, by recognizing only the deceitful or treacherous nature of spying. The law admits that harsh deterrence is necessary to defend against spying, but since little personal deceit is involved in most technical intelligence gathering, the law of war rejects individual punishment for engaging in such activities.⁶⁴ Unfortunately, while broad consensus exists regarding the status of the spy in wartime, less of a consensus exists as to peacetime espionage. In fact, peacetime espionage is barely considered at all. Richard Falk observed:

Traditional international law is remarkably oblivious to the peacetime practice of espionage. Leading treatises overlook espionage altogether or contain a perfunctory paragraph that defines a spy and describes his hapless fate upon capture. And yet espionage has always played a prominent role in international relations.⁶⁵

Almost all international legal consideration of espionage is made in reference to wartime, even though the domestic statutes of most nations include espionage and related crimes such as treason and sedition. Penalties for peacetime espionage vary, but are universally severe.⁶⁶ Still, espionage itself is rarely outlawed — only espionage directed against, or dangerous to, that particular state is banned.⁶⁷ Lacking recognition, is peacetime espionage legally wrong under international law? Professor Manuel Garcia-Mora states, "Though international law does not explicitly condemn wartime espionage, peacetime espionage is regarded as an international delinquency and a violation of international law."⁶⁸ Likewise, Professor Quincy Wright notes:

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.⁶⁹

64. See *supra* notes 36, 50, 51, 54.

65. Richard A. Falk, *Foreword*, *ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW* v (Roland Stanger ed., 1962).

66. See, e.g., *supra* note 15.

67. *Id.*

68. Manuel R. Garcia-Mora, *Treason, Sedition and Espionage as Political Offenses Under the Law of Extradition*, 26 U. PITT. L. REV. 65, 79-80 (1964).

69. Quincy Wright, *Espionage and the Doctrine of Non-Intervention in Internal*

Despite these protests, scholarly treatment of peacetime espionage has been inconsistent. Some of the most authoritative opinions hold that "... it is not considered wrong morally, politically or legally ..." to send spies abroad.⁷⁰

Since World War II, national leaders and policy makers have occasionally felt obligated to comment on international events involving peacetime intelligence activities. These comments reveal a desire either to invoke or to appear to adhere to an international law that did not exist. As noted earlier, all forms of collection — including technical means — are labeled spying in popular and scholarly writing. Meanwhile, intelligence organizations avoid use of the word "spy" in some of the most appropriate instances (such as with "case officers"). International law, however, simply ignores the question of peacetime spying.

One particular event, the Gary Francis Powers U-2 Incident, highlights the problems caused by imprecise definitions. The incident forced a clearer recognition of the modern status of strategic reconnaissance.⁷¹ Given the previous definition of espionage, the following dis-

Affairs, ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW 12 (Roland J. Stanger ed., 1962); See also R. Baxter, *So-called 'Unprivileged Belligerency': Spies, Guerillas, and Saboteurs*, 28 BRIT. YRBK. INT'L. L. 323 (1951). Notably, Mr. Rogovin, Special Counsel to the CIA, testified at a House Committee hearing that "Espionage is nothing but the violation of someone else's laws." *U.S. Intelligence Agencies and Activities: Risks and Control of Foreign Intelligence, 1975: Hearings: House Select Committee on Intelligence*, Part 5, Dec. 9, 1975, at 1767.

70. OPPENHEIM, *supra* note 5, at . Curiously, Oppenheim adds that "[a] spy cannot legally excuse himself by pleading that he only executed the orders of his Government, and the latter will never interfere, since it cannot officially confess to having commissioned a spy." *Id.*; For a consideration of several international legal theories and practices under which the sending or tolerance of intelligence gatherers has been subsumed, see Michael J. Barrett, *Honorable Espionage*, J DEF & DIPL, Feb. 1984 at 13-21, 25, 63, Mar. 1984 at 12-17, 62, Apr. 1984 at 17-21.

71. That the U-2 incident and the United States response was seminal in the development of intelligence history is indicated by the following examination of Secretary of State Christian Herter by Senator William Fulbright in 1960:

The Chairman: Mr. Secretary, you are a longtime devotee of international relations and thoroughly familiar with precedents in this field. Is the public assumption of responsibility for espionage by the head of a state the usual and customary practice among nations?

Secretary Herter. No. The general practice has been, I think, for a long period of time to deny any responsibility whatever.

The Chairman: Do you know of any precedent in our history or in the history of any great nation in which the head of state has assumed personal responsibility for espionage activities?

Secretary Herter: No. I do not know of any firsthand. It may be that there have been some. On the other hand, I would point out, Mr. Chairman, that this particular incident was of a very unusual nature.

The Chairman: As a general policy, do you believe it is wise for the head of state to assume responsibility for espionage activities?

cussion of the U-2 incident delineates technical intelligence as an activity other than espionage in an international legal sense.

In 1955, the CIA completed development on the U-2 photo-reconnaissance airplane.⁷² The U-2 was among the first technical systems designed solely for strategic intelligence missions.⁷³ From 1956 until 1960, U-2 flights regularly crossed Soviet territory, gathering information immensely valuable to American military and political planners. In 1960, the Soviets shot down an American U-2 plane and captured pilot Gary Powers, who was a contract employee for the CIA. Before the shootdown, the United States government consistently denied photo overflights just as governments traditionally disavowed knowledge of action by their espionage agents. Plausible denial was the universal international posture regarding spies; intelligence overflights seemed to merit the same response. Even if such overflights were not formally an illegal practice among nations, they would be seen as unfriendly acts. United States policy makers, not overly concerned that the public knew it was spying on the Soviets, knew government admission of the unfriendly act promised to sour diplomatic rapprochement. Indeed, the U-2 incident caused the failure of the Eisenhower-Khrushchev Paris Summit Conference.⁷⁴ Against the common practice of denial, the Americans equally had to consider the fate of an individual spy as allowed by international law, albeit expressed only in the law of war. The U-2 was a "spy" plane and by semantic association, the pilot was a "spy."⁷⁵

Secretary Herter: Well, very frankly, I don't think it makes a great deal of difference from the public point of view. On the other hand I believe in a case of this kind the telling of the truth was the better course than getting deeper into fabricating excuses or disavowing responsibility.

Events Incident to the Summit Conference, 1960: Hearings Before the Senate Committee on Foreign Relations, 86th Cong., 2d Sess. 26 (1960) [hereinafter Events Incident to the Summit Conference].

72. For a brief description of the U-2 and the U-2 program development see RAY S. CLINE, *SECRETS, SPIES AND SCHOLARS: BLUEPRINTS OF THE ESSENTIAL CIA* 157 (1976); SANCHE DEGRAMONT, *THE SECRET WAR, THE STORY OF INTERNATIONAL ESPIONAGE SINCE WORLD WAR II* 246 (1962); and see generally *Events Incident to the Summit Conference*, *supra* note 71; for further references on the U-2 incident, see PETERSEN, *supra* note 2, at 245.

73. On the origins of the U-2 program see Richard M. Bissel, Jr., *Origins of the U-2*, 36 *AIR POWER HIST* 15, 21 (1989).

74. For discussion of the political and diplomatic consequences of the U-2 shootdown, see generally MICHAEL BESCHLOSS, *MAY-DAY: EISENHOWER, KHRUSHCHEV, AND THE U-2 AFFAIR* (1986).

75. The American policy of denial was based on several reasons besides inertia in international practice or underdevelopment of international law. American intelligence may not have been sure whether or how much the Soviets knew about the U-2 program. Tight security was expected to prolong the life of a secret program that the CIA had anticipated would someday be countered. Other strategic gathering efforts were being mounted, such as drone aircraft flights over China and U-2 flights

After Powers was shot down, the United States continued for a time to dissemble. In retrospect, the story of a weather plane hundreds of miles off course seems ludicrous, but at the time perhaps it was a game effort. The Soviets caught the United States government in an embarrassing lie when it became clear that Powers had not been killed. Rather, Powers had described the purpose of his flight to his captors, and parts of the plane had been recovered. The United States then admitted to an act of espionage and tacitly conceded the Soviet right to hold Powers and punish him as a spy.⁷⁶ Initial Soviet accusations of espionage and American responses were tied to an apparently mutual opinion that such "espionage" violated the laws of peace, or at least the laws of war. Actually, the laws of peace barely address the question of espionage, and the laws of war distinguish espionage from intelligence gathering that does not entail personal deceit.⁷⁷

Eventually, the United States argued that the U-2 flights were responsible acts necessary to monitor military developments in the Soviet Union. The new American stance was apparently intended to shift international attention away from the American mistake and onto the issue of Soviet secrecy. Moreover, President Eisenhower finally decided not to deny his personal knowledge of the U-2 flights. Hind-sight suggests that the United States could have argued the U-2 flights were legal acts of reconnaissance under international law and that Powers should have been held to no more personal liability than a dispatcher of official messages (or a balloonist) under the laws of war.⁷⁸

Today, technological developments have partially obviated the kinds of issues raised by the Gary Powers incident. Satellites and unmanned vehicles can accomplish the same reconnaissance mission without endangering a pilot. However, the introduction of new equipment does not usually end continued use of older systems, and there are many types of technical collectors besides reconnaissance aircraft. In 1979, the United States was forced to abandon ground based signals intercept stations located in Iran.⁷⁹ The abandonment was based upon the potential danger to personnel if a station was captured and the occupants were accused and prosecuted for spying.

over a number of smaller countries. Admission of the Soviet overflights was sure to prompt questions and accusations from other countries previously unaware of or indisposed to admit the existence of similar flights over their territories.

76. *Events Incident to the Summit Conference*, *supra* note 70.

77. *Supra* notes 36, 50, 51, 54, 64.

78. *Cf.*, *Declaration of Brussels*, art. 22, *supra* note 40; *The Hague Rules of Air Warfare*, *supra* notes 53, 54.

79. See Herbert Scoville, Jr., *SALT Verification and Iran: Hearings on Military Posture Before the House Committee on Armed Services*, 96th Cong., 1st Sess. at 2720 (1979).

III. TODAY'S COLLECTION ENVIRONMENT

During the Cold War, intelligence collection efforts were paced by technological advances. Weapons of mass destruction increased fears about technological surprise, while potential shortages of key raw materials intensified competition both for resources and technologies.⁸⁰ These pressures dramatically influenced the international intelligence activities of the superpowers and their surrogates. With the end of the Soviet-American confrontation, a broad concert of threats to peace and stability has become visible. Some of these threats include the black market trading of nuclear material, weapons proliferation (including weapons of mass destruction in the hands of rogue states, terrorists and organized criminals), conflict over scarce resources and environmental values, ethnic and religious conflict, spread of uncontrollable viruses and other diseases, the transnational linkages of crime, drug trafficking and terrorism and insurgency, illicit electronic capital movement, migration and illegal immigration, famine, mob violence, and spontaneous ungovernability. Given this increasingly complex and sophisticated threat-based environment, many governments look to international organizations, richer allies, the press, and their own agents to supply critical intelligence. As such, it is curious that the debate regarding spies has been so narrowly focused on the 'nasty side' of the spy's image.

Objectivity leads to the uninspiring conclusion that real spies are neither Ian Fleming's Bonds nor John LeCarre's seedy, sordid little men.⁸¹ Double agents, fabricated stories that oust presidents, blown covers that lead to murder, although sensational news copy, are barely useful in identifying or categorizing the spy.⁸² Questioning who spies really are may prove valueless, because the spying act may be the only common denominator. Backgrounds, motives, and abilities widely vary; yet, a review of the American debate reveals a selection of problems regarding the spy's legal identity. The law of war approach has been to identify who is not a spy, hence the logical exclusion of pilots and technical collectors. In the United States, congressional attempts to limit the use of certain groups of people and professions by national intelligence organizations have focused in great measure on news reporters. Past debates have oriented around "protecting" news reporters from

80. On the question of superpower competition for raw materials and the nature of Cold War geopolitical competition see RONNIE D. LIPSCHUTZ, *WHEN NATIONS CLASH: RAW MATERIALS, IDEOLOGY, AND FOREIGN POLICY* (1989); COLIN S. GRAY, *THE GEOPOLITICS OF SUPER POWER* (1988).

81. See generally IAN FLEMING, *ON HER MAJESTY'S SECRET SERVICE* (1963); JOHN LE CARRÉ, *THE SPY WHO CAME IN FROM THE COLD* (1964).

82. For discussion on the necessity of espionage see Herbert Scoville, Jr., *Is Espionage Necessary for Our Security?* 54 *FOREIGN AFF.* 482 (1976); See also Samuel Halpern, *Clandestine Collection*, in *INTELLIGENCE REQUIREMENTS FOR THE 1980's* 37 (Roy Godson ed., 1980).

"spies," but perhaps such debate might have been better oriented around protecting reporters from being categorized as spies.⁸³

In 1981, American intelligence activities became guided and limited partly by Executive Order 12,333, which replaced Executive Order 12,036 of 1978.⁸⁴ Executive Order 12,333 defined certain terms, created the Intelligence Oversight Board, indicated the Board's duties and responsibilities within the community, and established restrictions on certain activities. In 1993, Executive Order 12,863 dissolved the Intelligence Oversight Board and transferred its functions to the Presidential Foreign Intelligence Advisory Board, PFIAB.⁸⁵ Restrictions on American intelligence deal mostly with domestic activities or with the rights of American citizens at home or abroad. Executive Order 12,333, for instance, prohibited the use of religious missionary groups and news media as cover identities for national intelligence agents.

Bills were introduced into both the United States House of Representatives and the Senate in the early 1980s with the purpose of establishing a legislative charter for intelligence activities. To date, no charter legislation has been passed.⁸⁶ The thrust of the bills was to further prevent government intelligence functions from tainting other information-oriented professions. The outcome of the intelligence legislation debate seems to have favored liberal intelligence collection rules. On its own, the CIA has exempted humanitarian organizations such as the Red Cross, CARE, UNICEF, Rockefeller Foundation, Ford Foundation, the Peace Corps, and Fulbright Scholars from being used in clandestine activities, including cover.⁸⁷ However, the problem of a clandestine identity is central to the successful conduct of espionage. Multinational corporations, missionary groups, news media and academic

83. Journalists are often accused of spying. See *U.S. Journalist Faces Charges Of Espionage*, WASHINGTON POST, Nov. 8, 1995, at A25.

84. Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (1981).

85. Exec. Order No. 12,863, 3 C.F.R. 632 (1993).

86. The last serious attempt to provide a legislative charter for intelligence activities was titled the "National Intelligence Act of 1980." The stated purpose of the Act was "to authorize the intelligence system of the United States by the establishment of a statutory basis for the national intelligence activities of the United States," and for other purposes. Hearings were held Feb. 21, 1980. The bill was amended on May 15, 1980. S. REP. NO. 730, 96th Cong., 2d Sess. (1980). The amended version was passed by the Senate on June 3rd, 1980 and sent to the House Committee on Foreign Affairs (June 26) and the House Permanent Select Committee on Intelligence. The Senate sent an amendment (No. 1774, calendar No. 780) to add a new section prohibiting employment of certain persons by an agency or department and to prohibit a federal employee engaged in intelligence activities from posing as a member of a United States religious, news media, or academic organization. Provisions of Senate Bill 2284 are printed in 3 THE AMER INTELL J 14 (1980). The bill was not voted on in the house.

87. See Thomas Everson, *Controlling the Spies*, 12 CENTER MAGAZINE 60 (1978); Charles E. Thomann, *The National Intelligence Act of 1980*, 3 THE AMER INTELL J 8 (1980).

institutions can provide credible identities. Without access to such cover it is far more difficult for an intelligence operative to establish a natural presence in many places. Alternately, organizations whose primary function is not intelligence may lose access to places, information, and trust if they are identified as clandestine intelligence fronts.

Actions should be the basis for defining espionage, not association with particular groups. Nevertheless, attempts to place legal restrictions on espionage activity often target the problem of cover according to group association. The most developed debate on the subject has been in reference to the news media.⁸⁸ Arguments made about the relationship between the United States news media and the United States intelligence community are applicable to other cover situations. The intelligence-news media relationship is the most universal, complex, and perhaps most important in terms of world public order. After all, news organizations produce public intelligence; they survive on timely collection, analysis, and dissemination of information supposedly useful for public decision making, and they are sometimes the producers of the only intelligence available. What holds true for the policy information function of the news media can be applied by extension to other non-state organizations.

Similarities between the news and intelligence industries are numerous enough that contact between the two is inevitable. At the collection level, the conditions of the two efforts may often be extremely similar. To achieve success, news reporters often depend upon access to closely held information. This access develops through the establishment of contacts and the encouragement of mutual trusts. Reporters usually have a good excuse for being where they are, and because of the threat they pose to the unreceptive political leader, they are rarely imprisoned or executed. Thus, members of the news media are very alluring to intelligence officers wishing to tap such freedom of movement. In turn, media personnel often seek inside information, leads, and analyses that only intelligence officers can provide. On issues of military affairs and movements, or on major governmental actions within closed societies, a reporter wanting the best knowledge cannot ignore the potential help of a state intelligence organization. Therefore, the relationship between reporters and intelligence personnel also becomes one of mutual use.⁸⁹

88. See *The CIA and the Media: Hearings Before the House Subcomm. on Oversight of the Permanent Select Committee on Intelligence*, 95th Cong., 1st and 2nd Sess. (1978); see also Lawrence J. Mitchell III, *Espionage: The Symbiotic Relationship Between the Central Intelligence Agency and the American Press Corps*, 11 SUFFOLK TRANSNAT'L L. J. 41 (1987).

89. "In my field experience in recent years, I have found it is more the press that woos the CIA than the CIA that woos the press. It seems almost automatic as a journalist comes into a small country that he asks to see first the ambassador and second the station chief." Statement of Dean Brown, *The CIA and the Media*, *supra*

Some members of the American news media have argued for legislation requiring strict limitations on contact between United States intelligence personnel and news persons.⁹⁰ One reason given for such enforced separation concerns the credibility and access that some foreign correspondents feel are damaged by association with American intelligence, especially the CIA. A second argument holds that if United States intelligence agencies deal in any way with reporters abroad, then a governmental interference with the free press has occurred.⁹¹ The arguments, however, are complexly shaded. Descriptions of how the news media involves itself with American intelligence agencies form no clear-cut pattern. Some of the news-intelligence relationships considered by the congressional debate can be categorized as follows:

1. A news reporter is questioned for information by an intelligence officer.
2. An intelligence agent asks a news reporter to find out a specific piece of information made available by his special access, mobility or contacts.
3. A news reporter contracts to regularly provide information to an intelligence service.
4. An intelligence agent represents himself as a news reporter without the knowledge or consent of the news service.
5. An intelligence agent represents himself as a news reporter with the consent of the news service.
6. An intelligence officer asks a news reporter to publish a particular story in a foreign journal.
7. An intelligence officer asks a news reporter to publish a particular story in a domestic journal.
8. A news reporter informally bargains with an intelligence officer over a trade of information.
9. A news reporter volunteers information to an intelligence service on his own initiative.
10. A news reporter interviews an intelligence officer in developing a story.
11. A news reporter shows an intelligence officer certain news items, already published or about to be published which deserve special attention.
12. An intelligence officer verifies or corrects for a news reporter some already published news item.

A news reporter's citizenship, staff or freelance working status, and the national identity of the news organization all further complicate the situational possibilities. There is a distinction, however, if the intelligence officer is overt (as say, an embassy official), or undercover. The presence of foreign intelligence personnel in many foreign news organizations further muddles the issue. It might be possible to prohib-

note 88, at 146.

90. See, e.g., statement of Stuart Loory, *Id.* at 196.

91. See, e.g., the statement of Morton Halperin, *Id.* at 188.

it American intelligence officers from contacting American media personnel abroad, but such a prohibition would likely diminish the quality of both the intelligence and the news products. American news reporters would still regularly deal with foreign intelligence services unless the American reporters abstained from dealing with the foreign press.⁹²

After the international news media, the next most relevant identities are the information gatherers of non-governmental, public international and private volunteer organizations. Many organizations, such as Amnesty International, are intelligence collection and reporting organizations with specific missions. Separating the activities of such intelligence organizations from state intelligence services would prove difficult. A particular State service of dubious reputation could be the intelligence target of a non-governmental organization such as Amnesty International. On the other hand, protection of human rights will be among the principal collection mandates of some state-sponsored intelligence efforts—often making cooperative involvements between state intelligence services and non-governmental organizations natural. Designation of groups as off-limits to use by intelligence organizations is, therefore, impractical and counterproductive to the international flow of public intelligence.

Lawmakers probably cannot draft universal, objective, yet useful legislation regarding ethical relationships between news reporters and intelligence personnel abroad. This is not to take the cynical view that ethics do not apply, but rather that ethical behavior depends upon the character of the individual news reporter or intelligence officer. Education and training are equally important. For some antagonists of espionage, situational ethics evoke the type of theoretical moral flexibility that is responsible for ethical failings, and is, therefore, unacceptable. Nonetheless, most ethical decisions must be left to the practitioners. News and intelligence organizations will develop and meet their own ethical standards in direct relationship to the quality of the organizations' personnel and their moral indoctrination.⁹³

92. The Western concept of a free press is of course not universally accepted and may be endangered by the very fact that there is no separation between some foreign press systems and their respective government information and intelligence systems. See *Subcommittee on International Operations of the Senate Foreign Relations Committee*, 95th Cong., 1st Sess. (1977).

93. "I believe that it should be emphasized over and over again that in this kind of relationship in the past, as in the future, a great deal of responsibility has to rest on the journalist himself. Statement of Tad Szulc, *The CIA and the Media*, *supra* note 88, at 103; "... my agents and I had a clear understanding that they did their intelligence work for me, but that the news reports they wrote were a matter between themselves and their editors and were not given prior clearance or direction by me." Statement of William Colby, *Id.* at 4.

While municipal legislation to restrict intelligence agency functions might help protect the civil liberties of a state's citizens, international proscriptions regarding contact with intelligence personnel would not improve moral conduct and would probably erode the quality of available intelligence.

IV. CONCLUSIONS

In the future, we will see continuing growth in the intelligence collection function of international organizations, many associated with the United Nations. These organizations will mount new information gathering efforts, request nationally derived intelligence information from member countries, and seek information produced by news organizations and other private groups. Structured intelligence endeavors will be increasingly common among international organizations, and a great part of these intelligence efforts will involve human collection.

What then are the possibilities for the development of international law on peacetime espionage? Adoption and codification of historical approaches are most likely. Espionage should be narrowly defined to exclude acts of technical intelligence gathering. This exclusion would be in consonance with the laws of war. Others who are clearly intelligence gatherers (e.g., scholars, students, news reporters, or members of non-governmental organizations) should not be considered spies if collecting within the scope of their express identities.

While clandestine information gathering will continue to be considered an unfriendly act between nations, such activity does not violate international law. The viability of the worldwide intelligence function depends upon nationally mounted intelligence efforts and other human intelligence gathering groups, including, but not limited to, the international press, information gatherers of public international organizations, and information gatherers of non-governmental organizations. Therefore, classification of individuals as spies (for the purpose of prosecution) should be explicitly constrained by international law, and the prosecution of individuals as spies during peacetime should be impaired by international proscriptions. Efforts to isolate groups or professions from members of intelligence organizations should be rejected as impracticable and counterproductive. Preserving the paradox of espionage, punishment of spies caught in the act should continue to

be permitted under international law, but the death penalty should not be admitted for any act of peacetime espionage, even involving clear deceit.⁹⁴

94. Since the death penalty is now being questioned in all its aspects as punishment for even the most heinous crimes in domestic law, it is surprising that it is not questioned in international law when applied to those who act for patriotic purposes. It is inconsistent with the fundamental humanitarian objective of Protocol I to impose no limitations upon the customary use of the death penalty as a sanction applied to spies.

Mallison, *supra* note 61, at 27-28.