

THE LEGALITY OF ESPIONAGE UNDER INTERNATIONAL LAW

*Juan Pablo Hernández**

Table of Contents

I. Espionage during Wartime	32
II. Espionage during Peacetime.....	32
A. <i>A Breach of the UN Charter?</i>	33
B. <i>Diplomat or Spy: Diplomatic Law</i>	34
C. <i>Breach of Customary International Law?</i>	36
D. <i>Estoppel and Persona non Grata Declarations</i>	36
E. <i>Cyberespionage</i>	37
III. Conclusions	38

The issue of espionage is an important aspect of international relations that is usually overlooked by legal literature. It is a sensitive issue, normally measured against situational ethics or political convenience, rather than the yardstick of international law. As a result, the legal status of espionage is mired with uncertainty and ambiguity, as this article will show.

* Juan Pablo Hernández is the founder and editor-in-chief of *The Treaty Examiner* and a Moot coach at Universidad Francisco Marroquín (Guatemala).

I. ESPIONAGE DURING WARTIME

The legal effects of espionage are clear during wartime. A ‘spy’ is an agent of one belligerent that gathers information of the opponent clandestinely, under false pretense or in disguise, with the intention to communicate it to the first belligerent.¹ Under treaty and customary humanitarian law, spies do not enjoy prisoner-of-war protection. A spy captured during an espionage operation can be convicted for his or her acts – although convictions cannot be handed down without a prior, regular trial in accordance with basic rules of due process.² The legal *status* of wartime espionage, on the other hand, is less certain. International humanitarian law (IHL) does not declare espionage outright illegal. However, as with any war practice, it does not condone it either. IHL places great importance on transparency of the affiliation of combatants and the status of other participants in war. As irregular agents that undertake covert operations, spies are considered unlawful combatants.

II. ESPIONAGE DURING PEACETIME

During peacetime, the position of espionage is more ambiguous. No treaty exists regulating the use of covert agents for the purposes of gathering intelligence. It is even difficult to determine the proper scope of what constitutes ‘espionage’ for the purposes of international law – for instance, whether espionage covers also diplomats that attempt to uncover sensitive information of the receiving State to disclose it, or even journalists that clandestinely leak information to a foreign

¹ See Article 46 of the 1977 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Additional Protocol I).

² See rule 107 of the Database of Customary IHL hosted by the International Committee of the Red Cross.

State. The legality of espionage must be measured against general international law and existing instruments.

A. A Breach of the UN Charter?

The 1945 *Charter of the United Nations* (UN Charter) establishes some of the most basic principles that govern modern international law. Article 2(4) of the UN Charter, establishing the principle of non-intervention, states as follows:

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.

Some authors take a hard line on espionage. They argue that espionage, which involves the presence of clandestine agents in the territory of another State, violates the general duty of non-intervention mandated by the UN Charter.³ Those opinions fall short of considering espionage an international crime.⁴

It is doubtful that espionage breaches the non-intervention principle of Article 2(4). The deployment of covert agents into the territory of other States normally seeks to influence or collect information of internal affairs of another State.⁵ The

³ Quincy Wright, *Espionage and the Doctrine of Non-Intervention in Internal Affairs*, in Quincy Wright, Julius Stone, Richard Falk and Roland Stanger, *Essays on Espionage and International Law*, Ohio State University Press (1962), p. 12.

⁴ Ingrid Delupis, *Foreign Warships and Immunity for Espionage*, *American Journal of International Law*, Issue 53 (1984), p. 68.

⁵ See, for the sake of example, *US Code*, Title 50, Chapter 15, Subchapter III, Section 413b(e) (by reference to the 1947 *National Security Act*), which defines 'covert action' as 'activity or activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly...'

purpose of collecting information *per se* could hardly constitute intervention (see *infra* on diplomatic law). Seeking to influence internal affairs, conversely, is far less benign – however, whether mere interference violates the non-intervention principle is debatable.⁶

On the other hand, some authors claim the legality of espionage stating that it is a form of ‘pre-emptive’ or ‘anticipatory’ self-defense.⁷ However, the existence of a right to pre-emptive self-defense is in itself doubtful under the UN Charter framework.⁸

B. Diplomat or Spy: Diplomatic Law

The main purpose of espionage is to collect information of the host State and communicate it to the sending State. This purpose is not unheard of in international law. Diplomatic law states it as one of the tasks entrusted on diplomatic missions.⁹ Spies and diplomats are different in four respects. **First**, spies do not disclose their status to the receiving State, as their operation is covert. **Second**, unlike diplomats, spies do not only seek to ascertain ‘conditions and developments’ in the receiving State, but also to uncover confidential and highly sensitive information that the receiving State does not make readily available (for instance, national security information). **Third**, unlike diplomats, spies do not necessarily employ lawful means in that endeavor. **Finally**, diplomats have multiple functions aside from information collection: the 1961 *Vienna Convention*

⁶ See International Group of Experts at the Invitation of the NATO Cooperative Cyber Defence Centre of Excellence, *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press (2013), rule 10, comment 8.

⁷ Commander Roger Scott, *Territorially Intrusive Intelligence Collection and International Law*, *Air Force Law Review*, Issue 46 (1999), p. 224.

⁸ Josh Radsan, *The Unresolved Equation of Espionage and International Law*, *Michigan Journal of International Law*, Volume 28, Issue 3 (2007), p. 604.

⁹ See Article 3(1)(d) of the VCDR.

on Diplomatic Relations (VCDR) states that the other functions of diplomats are to represent their sending State, to protect its interests and its nationals abroad, to negotiate and to promote friendly relations (see Article 3(1)). The similarity of the roles creates a significant risk of overlap, which has led States to expel diplomats on accusations of espionage. Some authors consider that sending spies under the guise of diplomats is an abuse of diplomatic immunity and privileges.¹⁰

The VCDR does not regulate the scenario of sending covert agents to collect sensitive information or influence internal affairs. Something that can be pointed out is that one of the purposes of the VCDR is to facilitate friendly relations between States; whether espionage is conducive to friendly inter-State relations appears to be a matter of situational analysis. However, interpreting the legality of espionage from the VCDR's silence would be repugnant to the object and purpose of that treaty.¹¹ As clarified by the preamble of the VCDR, non-regulated issues should continue to be regulated by international custom.

¹⁰ Nathaniel Ward, *Espionage and the Forfeiture of Diplomatic Immunity*, *International Lawyer* (1977), p. 659.

¹¹ Compare this situation to the 1951 *Haya de la Torre* (Colombia v. Peru) case before the International Court of Justice (ICJ). The case concerned the granting of asylum by the Colombian Embassy at Lima to Víctor Haya de la Torre (a Peruvian national). In the 1950 *Asylum* case, the ICJ found that the asylum was not granted regularly and that it needed to be terminated as soon as possible. Colombia initiated proceedings again inquiring whether there was an obligation to surrender Haya de la Torre. The ICJ indicated that the 1928 *Convention on Asylum* (Havana Convention) did not regulate cases of irregular asylum where the territorial State had not asked for the person to be sent out. The ICJ concluded that it would be 'repugnant' to the object and purpose of the Havana Convention to interpret that this silence implies an obligation to surrender the refugee. As with the manner of termination of irregular asylum under the Havana Convention, it appears that the issue of espionage has mostly been left to political expediency.

C. Breach of Customary International Law?

Customary international law refers to the practice of States accepted by them as mandated by law.¹² Treaty law sometimes codifies such custom, but the latter remains a main and independent source of international law. To establish international custom, there must be uniform and constant practice by States denoting a sense of legal obligation.¹³ Acts taken for mere political convenience or courtesy fall short of custom.

It is highly questionable that there is a customary norm prohibiting espionage. Even if espionage could be considered immoral or unfriendly in international relations, that is not enough to crystallize custom. More than that, State practice is inconsistent. States are less tolerant of espionage against them than of their own espionage. The widespread use of espionage by States is usually invoked to demonstrate a lack of customary prohibition.¹⁴ That is not to say that there is State practice to the contrary – permission is also not supported by custom. Espionage appears to be a blind spot in customary international law.

D. Estoppel and Persona non Grata Declarations

It is a well-established principle of international law that States cannot go back on their previous statements or conduct if such practice was detrimentally relied upon by another State

¹² See Article 38(1)(b) of the Statute of the International Court of Justice.

¹³ Malcolm Shaw, *International Law*, Cambridge University Press (8th Edition, 2017), p. 56.

¹⁴ Arbër Ahmeti, *Question on Legality of Espionage Carried Out Through Diplomatic Missions*, International Association for Political Science Students, 16 February 2015, available at: <https://www.iapss.org/2015/02/16/question-on-legality-of-espionage-carried-out-through-diplomatic-missions/>.

(*estoppel*).¹⁵ The estoppel principle could prevent States from challenging the legality of espionage operations on the basis that the practice of espionage is widespread in the accusing States, presumably inducing reliance on the challenged State.

On the other hand, considering the (claimed) widespread use of espionage in international relations, it is unlikely that States will attempt to challenge another State's espionage operations before a court of law. Diplomatic law gives States a far more effective power: to unilaterally declare diplomatic agents *personae non gratae*¹⁶ for interfering in internal affairs.¹⁷ The expulsion of diplomatic agents claimed to be intelligence gatherers undercover is not rare.¹⁸ This is a possible tool if a diplomatic agent is discovered to be engaging in espionage.

E. Cyberespionage

Not all espionage is done through the sending of covert agents. Espionage through surveillance programs or remote monitoring systems is also possible with today's technology. According to the *Tallinn Manual on the International Law Applicable to Cyber Warfare* (Tallinn Manual), the principle of non-intervention applies to war initiated or conducted through cyber-attacks.¹⁹ In the context of remote espionage through surveillance systems, the same rules on non-intervention,

¹⁵ Thomas Cottier and Jörg Paul Müller, *Estoppel*, Max Planck Encyclopedia of Public International Law (2007).

¹⁶ See Article 9 of the VCDR.

¹⁷ See Article 41(1) of the VCDR.

¹⁸ BBC News, *Berlin Murder: Germany Expels Two Russian Diplomats*, 4 December 2019, available at: <https://www.bbc.com/news/world-europe-50659179>; BBC News, *Russian Spy: UK to Expel 23 Russian Diplomats*, 14 March 2018, available at <https://www.bbc.com/news/uk-43402506>; Deutsche Welle, *Bulgaria to Expel Two Russian Diplomats over Spying Allegations*, 24 January 2020, available at: <https://www.dw.com/en/bulgaria-to-expel-two-russian-diplomats-over-spying-allegations/a-52144255>.

¹⁹ See *supra* note 6, rule 10.

sovereign equality and political independence should continue to apply. The commentary to the Tallinn Manual states that cyberespionage operations lacking coercive elements do not *per se* violate the non-intervention principle, including when the intervention requires breaching protective virtual barriers.²⁰ Another central issue is whether a cyberattack or operation can be attributed to a State, which should follow ordinary norms of State attribution.²¹

III. CONCLUSIONS

State practice and treaty law are highly ambiguous on the issue of espionage. The better view is that current international law neither prohibits nor condones it – an uneasy permission of sorts. To the extent that a situation of espionage escapes rules on non-intervention, diplomatic relations and IHL, it appears that States are reluctant to impose a standard of legality to this issue. Given the covert nature of espionage, this hesitation is coherent. In the end, an overview of the legal norms at play reveals that espionage is an issue often left to considerations of political convenience rather than the scrutiny of international law.

²⁰ See *supra* note 6.

²¹ See *supra* note 6, rule 6.