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The Unresolved Equation of Espionage and International Law

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THE UNRESOLVED EQUATION OF ESPIONAGE AND INTERNATIONAL LAW

A. John Radsan*

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Every thirst gets satisfied except
that of these fish, the mystics

who swim a vast ocean of grace
still somehow longing for it!

No one lives in that without
being nourished every day.

But if someone doesn't want to hear
the song of the reed flute,

it's best to cut the conversation
short, say good-bye, and leave.¹

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1. Mowlana Jalaluddin Rumi, *The Reed Flute's Song*, in THE ESSENTIAL RUMI 19 (Coleman Barks trans., Harper-Collins 1997) (n.d.).

I. FROM POETRY TO PROSE

Mortals should not attempt to perform miracles. We cannot convert water into wine at weddings, turn lead into gold in a chemistry lab, or form a human being from a lump of clay. To accept reality is to abide by the laws of physics. Yet, even as we come to accept that we cannot simultaneously measure a particle's location and speed,² more modern principles take us deeper into doubt. Soon, one reference gives in to another, discoveries in the physical sciences affect the social sciences, and relativity is everywhere. Not all equations can be solved.

Espionage and international law start from different points. Espionage dates from the beginning of history, while international law, as embodied in customs, conventions, or treaties, is a more recent phenomenon. They are also based on contradictory principles. The core of espionage is treachery and deceit. The core of international law is decency and common humanity. This alone suggests espionage and international law cannot be reconciled in a complete synthesis. Perhaps we should leave it at that.

The incompatibility seems so simple to convey. But the legal academy does not tolerate the abstractions of other art forms, a stroke of black paint on white canvas, or layers of white on white. Pages have an insatiable appetite for words.

This Essay, in order to offer up something to that appetite, is divided into five parts. After this introduction, I describe a Hegelian impulse, the perpetual drive to find unity in disorder. That impulse, for better or worse, creates the train and the track for many of the academy's journeys. I then define what I mean by "intelligence activities" for purposes of this Essay, after which I survey the scholarship that existed before this symposium on the relationship between espionage and international law. As the number of pages written on this topic suggests, scholarship on espionage and international law has not been very extensive. My survey of the scholarship concludes by leaving us in an ambivalent position: espionage is neither legal nor illegal under international law. Espionage exists between the tectonic plates of legal systems. Following my survey of the literature, I describe a set of dualities that informs the international practice of espionage. This final Part, inspired by mystical poetry, is the most substantial part of this Essay. Coming full circle, my conclusion, as presaged by my introduction, is that rather than force synthesis, we should tolerate the ambiguities and paradoxes inherent in the world's

2. Werner Heisenberg, *The Physical Content of Quantum Kinematics and Mechanics*, in *QUANTUM THEORY AND MEASUREMENT* 62 *passim* (John Archibald Wheeler & Wojciech Hubert Zurek eds. & trans., Princeton Univ. Press 1984) (1927).

second oldest profession. Accepting that espionage is beyond the law, we should move on to other projects—with grace.

II. RESISTING THE HEGELIAN IMPULSE

I am pleased to have been invited to this symposium. As a visitor from a neighboring state, I hope my behavior and my comments comport with the politeness expected from a guest in someone else's home. For months before this symposium took place, the website for the *Michigan Journal of International Law* identified the proposed topic of our discussion. To focus my research, I went to that page several times. It said: "While states may regulate intelligence gathering domestically, no significant treaties or conventions address the process, nor is it subject to any internationally recognized set of principles or standards [T]he lacuna in international law on these matters . . . suggests a clear need for focused discussion."³ In other words, although individual countries have regulated their intelligence activities through domestic statutes, very few countries, if any, have signed international treaties or international conventions that cover intelligence activities. Moreover, customary international law, so it seems, has very little to say about espionage.

Those who took the time to conceive this symposium label the lack of international norms on intelligence gathering a "lacuna," that is, a blank space or a gap in the law. Their characterization springs from two assumptions. First, they assume that international law is empty or nearly empty in regard to intelligence gathering. Even so, they are delicate about asserting proof of a negative proposition. They trust that the symposium's participants and speakers will join them in canvassing the international law and, by oral or written comments, will bring any relevant treaties or conventions to their attention. Second, even if they are correct in spotting the gap, they assume there is a point or a purpose in trying to fill it. They opt away from saying nothing or doing nothing about the emptiness.

This second assumption reveals a Hegelian bent to the project. They are active and dynamic toward a distant goal. Out of disorder and differences, they strive to discover (or to impose) some unity and cohesion on espionage and international law. Hegel, in line with this enterprise, once said, "The history of the world is none other than the progress of the consciousness of Freedom."⁴ For Hegel, the optimism is unrelenting. The

3. Mich. Journal of Int'l Law, State Intelligence Gathering and International Law, <http://students.law.umich.edu/mjil/brochure.pdf>.

4. G.W.F. HEGEL, PHILOSOPHY OF HISTORY 19 (J. Sibree trans., Dover Publications 1956) (1837).

symposium's organizers, whether knowingly or unknowingly influenced by Hegel, have not resigned themselves to pessimism.

There could be a value to the process of thesis, antithesis, and synthesis, repeating itself toward a better developed system of international law on intelligence gathering. Rest assured, I too am willing to march. But my approach, inspired by mystical poetry and analytical philosophy, remains skeptical of the ultimate value of any such Hegelian endeavor.⁵

It may not be fair for me to compare anyone to Hegel or to pick on an old German philosopher. Except for pockets of support, he has fallen out of favor with professional philosophers.⁶ I may already have given him too much credit. But in denying the Hegelian impulse, I recognize—and assert—that some quests and questions are meaningless, that more energy should first be spent defining our terms and concepts with precision. Caution should precede the expressions from our mouths, pens, and computers, and sometimes we should do no more than stay silent. To paraphrase Wittgenstein, the trick is to know what topics we should discuss and what topics we should pass over.⁷

If inertia is not an acceptable resolution to the tension between espionage and international law, it seems we could only move in one of two basic directions. The first is to attempt to eradicate espionage. We could, for instance, strip away the existing protections for spying. The Geneva Conventions, which provide some guidance on espionage during war, could be trimmed, and the Vienna Convention on Diplomatic Relations, which seems to protect diplomats whether or not they stick to diplomatic activities, could be limited. In this fashion, the costs for those who perform espionage could be raised to encourage eradication of the practice. In fact, costs could be raised so high that spies could be sum-

5. Hegel's supporters might incorporate my antithesis as part of his process so that I would be proving him at the same time I attempt to refute him. I would then define myself by what I negate.

6. See *Conversation Between M. O'C. Dreary and Ludwig Wittgenstein (Autumn 1948)*, in RECOLLECTIONS OF WITTGENSTEIN 97, 157 (Rush Rhees ed., 1984), in which Drury recounts a conversation with the grand Austrian:

We talked for a time about the history of philosophy. WITTGENSTEIN: Kant and Berkeley seem to me to be very deep thinkers. DRURY: What about Hegel? WITTGENSTEIN: No, I don't think I would get on with Hegel. Hegel seems to me to be always wanting to say that things which look different are really the same. Whereas my interest is in showing that things which look the same are really different. I was thinking of using as a motto for my book a quotation from *King Lear*: "I'll teach you differences." [Then laughing:] The remark "You'd be surprised" wouldn't be a bad motto either.

Id. I thank Russ Pannier for directing me to this source.

7. Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* § 7 (C.K. Ogden trans., Routledge 1998) (1921).

marily executed on the slightest of proof. It could become open season on spies. Moving in the opposite direction, international law could be adapted to accommodate espionage. Protections for spying could, for instance, be strengthened under international law. The principles of the Vienna Convention could be extended to all persons, diplomats or not, who commit espionage. The worst that could happen to spies would be that the country that captured them would deport them back to their home country. In this way, the costs could be decreased so that espionage would no longer be such a dangerous profession.⁸ How those two possible realities would ultimately differ from the current one is difficult to fathom and even more difficult to measure.

III. ESPIONAGE AS A SUBSET OF INTELLIGENCE ACTIVITIES

Intelligence can be divided into two basic categories: collection and analysis. This division corresponds with the two main sections at the Central Intelligence Agency: the Directorate of Operations and the Directorate of Intelligence. A “case officer” in the Directorate of Operations collects the intelligence and an “analyst” from the Directorate of Intelligence synthesizes intelligence that has been collected.

Covert action, however, does not fit into the traditional categories of collection and analysis at intelligence agencies. Covert action is not collection, nor is it analysis. For purposes of the requirements of presidential findings and congressional notification, U.S. law defines covert action as “an 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.”⁹ Carved out from the definition of covert action are a string of “traditional” activities: acquiring intelligence, performing counterintelligence, and maintaining operational security; conducting diplomatic and military activities; conducting law enforcement; and providing “routine support” to overt activities.¹⁰

During the CIA’s history since World War II, covert action has taken many forms: providing money and support to political parties in foreign elections (for instance, in Italy); creating and distributing propaganda in other countries (through platforms such as Radio Free Europe); attempting to assassinate foreign leaders (such as Fidel Castro); selling arms to countries friendly with terrorists (Iran) so that American hostages can be released; and training rebel armies (for instance, the Contras in

8. One would be left to wonder whether the nobility of the trade is tied to its danger.

9. The National Security Act of 1947, 50 U.S.C. § 413b(e) (2000).

10. *Id.*

Nicaragua).¹¹ Some of these covert actions got the CIA into trouble. Its efforts against Salvador Allende in Chile and its involvement in the Iran-Contra scandal are two prominent examples. The CIA's trouble, or the "blow-back," from covert action is one reason the old guard at the CIA shy away from it, convinced that the CIA should stay within its traditional role of gathering foreign intelligence. But President Bush, who is reported to have authorized a comprehensive covert action plan against al Qaeda after September 11,¹² is not too troubled by the CIA's past.

The CIA is not, of course, the only gatherer of intelligence for the United States. In the global struggle against terrorism, the CIA competes with the Defense Department to be the most important gatherer of intelligence. This stands true even though Michael Hayden has replaced Porter Goss at the CIA and Robert Gates has replaced Donald Rumsfeld at the Pentagon. Yet, no doubt, some of the CIA's covert actions may overlap with the Defense Department's military functions, and today many of the old lines between the intelligence function and the military function have blurred.

Having hinted at some of the complications that stem from covert action, I will leave it aside for purposes of this Essay. In that sense, I accept the recommendation of the old guard at the CIA that I focus on "collection," or the gathering of foreign intelligence. I will adopt the definition of foreign intelligence as "information relating to the capabilities, intentions and activities of foreign powers, organizations or persons, but not including counterintelligence except for information on international terrorist activities."¹³ This definition assumes the United States was not in a classic armed conflict during the Cold War and is not in an armed conflict on all fronts in the current war against al Qaeda.

Sometimes the CIA does simply gather intelligence during military operations. The intelligence that was gathered during the two Gulf Wars under the two Bushes—the locations of Iraqi tanks, missiles, and troops—is a classic example. Most of the time, however, the CIA's global operations take it outside areas that fit squarely within the pat definitions of intelligence activities or indeed within the laws of war. As applied to foreign intelligence, there is war, peace, and something between the two.

During World War II, the Office of Strategic Services, tutored by the British services, carried out many intelligence activities for the United

11. In the future, covert action may take the form of "information warfare," that is, attempting to disrupt or shut down an enemy through attacks on its computer networks.

12. Dana Priest, *Covert CIA Program Withstands New Furor; Anti-Terror Effort Continues to Grow*, WASH. POST, Dec. 30, 2005, at A01.

13. Exec. Order No. 12,333, pt. 3 § 3.4, 3 C.F.R. 200 (1982), *reprinted as amended in* 50 U.S.C. § 401 note (2000 & Supp. III 2003).

States. In 1947, a few years after World War II, the CIA was established¹⁴ as an intelligence agency for a peacetime of sorts. Congress's establishment and funding of the CIA serve as part of the proof that our two elected branches agree that both covert action (the "fifth function" from the CIA's original charter) and espionage are necessary against other countries, even during times of "peace." The Constitution, the National Security Act of 1947, and the Central Intelligence Agency Act of 1949,¹⁵ and the unending string of congressional appropriations for intelligence activities create a firm foundation, from the perspective of U.S. law, for the legality of espionage that the United States commits overseas.

In this Essay, I am most interested in "intelligence," defined narrowly to exclude covert action. Further, although foreign intelligence can be gathered through both technical and human sources, I focus on the human relationships, that is, the interactions between case officers and agents that constitute collection. Although I am aware that the CIA also collects information through open sources such as foreign newspapers and the Internet, and that other U.S. agencies, including the Department of State, are involved in collection, my focus is on the gathering of information from human beings through secret means. My definition of espionage, one of trench coats and Fedora hats, corresponds with the CIA's self-pronounced status as the American master of espionage. My definition, in this way, takes espionage back to its historical and international roots.

IV. THE LITERATURE ON ESPIONAGE AND INTERNATIONAL LAW

Most of the literature concerning espionage and international law addresses situations in which the laws of war apply. The rules of espionage in times of war, whether based on the Hague Regulations of 1907, the Geneva Conventions, the Protocol Additional to the Geneva Conventions, or other sources, are straightforward. A "scout," someone who stays in military uniform or sufficiently designates himself as a combatant, risks being caught behind enemy lines.¹⁶ If caught, this person

14. National Security Act of 1947, Pub. L. No. 80-253, ch. 343, § 102(a), 61 Stat. 497 (1947) (current version at 50 U.S.C. § 403 (2000 & Supp. III 2003)).

15. 50 U.S.C. §§ 403a-s (2000).

16. The Hague Regulations call this the "zone of operations." Convention Respecting the Laws and Customs of War on Land, Annex: Regulations Concerning the Laws and Customs of War on Land art. 29, Oct. 18, 1907, 36 Stat. 2277. The Additional Protocol calls this the "territory controlled by an adverse party." Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts art. 46(2), June 8, 1977, 1125 U.N.T.S. 3. The distinctions between these notions of "enemy lines" are not significant to the conclusions of this Essay. Suffice it to say that the scout or spy has been caught on the wrong side of the lines.

should be dealt with as a prisoner of war because there is nothing treacherous or deceitful about his scouting or reconnaissance mission. But a spy, someone who does not wear a military uniform or a clear military designation, is not entitled to protection as a prisoner of war. His deceit can lead to severe punishment from the captors. Despite the potentially harsh penalties, the trial itself for the charge of espionage should follow standard procedures. Note, by the way, that if the spy returns to his military organization after his mission and is then captured in battle wearing a soldier's uniform or designation, he cannot be punished for his prior act of spying. A spy therefore has a strong incentive to succeed in his spying mission and to return quickly to his military organization.

The literature concerning espionage and international law outside the laws of war is much less developed. As Richard Falk noted the year I was born, "[t]raditional 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."¹⁷ Those words remain a fair assessment of the state of the literature today.

The literature that does exist on peacetime espionage can be split into three groups. One group suggests peacetime espionage is legal (or not illegal) under international law. Another group suggests peacetime espionage is illegal under international law.¹⁸ A third group, straddled between the other two, maintains that peacetime espionage is neither legal nor illegal—perhaps, as Nietzsche would say, that it is beyond good and evil. In any event, the uncertainty in the literature supports my thesis that espionage is beyond international consensus.

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

18. In my article about the *Totten* doctrine, by which courts refuse to reach the merits of disputes that relate to secret agreements for secret services, I have already expressed a view about the legality of espionage. A. John Radsan, *Second-Guessing the Spymasters with a Judicial Role in Espionage Deals*, 91 IOWA L. REV. 1259, 1277–78 (2006) ("A particular embarrassment to the government from confirming or revealing the details of an espionage relationship, as opposed to other categories of classified information, is that espionage is illegal and has no status under international law.") As noted in this Essay, the actual spy has definitely committed crimes in the country where he operates, and, in that sense, espionage is illegal. To say that espionage "has no status under international law" is a less artful expression than what I have said in the text that accompanies this footnote. And even if I got something wrong as a passing reference in another article, it would be silly and stupid of me not to admit my mistake, to correct it, and to move on.

A. Espionage is Not Illegal

Geoffrey Demarest agrees with this symposium that there is an interesting lacuna between espionage and international law.¹⁹ But, like me, he is also careful to distinguish between espionage during wartime and espionage during peacetime. To Demarest, attention in the law to “peacetime espionage has lagged behind” the development of other international norms concerning intelligence gathering.²⁰ What there is in law is “virtually unstated.”²¹ Demarest’s conclusion is that, although espionage is “an unfriendly act,” it does not violate international law.²² In identifying a trend whereby international organizations such as the United Nations have increased their intelligence-gathering capabilities, he is in favor of espionage. In fact, Demarest seeks to ensure that rules against espionage will not apply to the gathering of intelligence through technical means such as satellites. Further, he considers another categorical protection: “Others who are clearly intelligence gatherers (e.g., scholars, students, news reporters, or members of nongovernmental organizations) should not be considered spies if collecting within the scope of their express identities.”²³ His concern is to ensure that people not be labeled spies with a broad brush, but his proposal does not address the possibility that a news reporter, for example, could be both covering her story and passing information to her home intelligence service. Demarest’s proposal also does not address how to avoid the exploitation of such *per se* exclusions from the spy label by intelligence services, which could use those excluded categories aggressively as a form of cover for their intelligence officers.

Another of Demarest’s proposals is more modest and less subject to disagreement. He argues that captured spies, even when convicted, should not receive the death penalty for peacetime espionage.²⁴ Only war, it seems, should lead to ultimate punishments. While concluding that peacetime espionage is not illegal, Demarest also makes arguments that could place him among those who maintain that peacetime espionage in reality is neither legal nor illegal. In particular, his mention of “preserving the paradox of espionage”²⁵ is consonant with many of my conclusions.

19. See Lt. Col. Geoffrey B. Demarest, *Espionage in International Law*, 24 *DENV. J. INT’L L. & POL’Y* 321, 321 (1996).

20. *Id.*

21. *Id.*

22. *Id.* at 347.

23. *Id.*

24. *Id.* at 348.

25. *Id.* at 347–48.

Demarest finds support from another military colleague, Roger Scott. Scott asserts that “[e]spionage is not prohibited by international law as a fundamentally wrongful activity.”²⁶ He may seem to be hedging by adding the adverb “fundamentally,” such that one is left to wonder whether espionage is wrongful at least in some way. The rest of his sentence, however, is less of a hedge: “it does not violate a principle of *jus cogens*.”²⁷ To give espionage some legal support, Scott ties it to the “right of anticipatory or preemptory” self-defense under the UN Charter and international law.²⁸ But that right, as Scott recognizes, is subject to much debate itself. The U.S. invasion of Iraq in 2003—when the United States decided not to wait any longer for Saddam Hussein to confirm his compliance with UN resolutions concerning the destruction of weapons of mass destruction—heightened the debate about the nature and existence of the right to anticipatory action. The foundation for peacetime espionage, to be sure, is not as firm as it could be. Despite that fact, Scott asserts on his own authority that “the surreptitious collection of intelligence in the territory of other nations that present clear, articulable threats based on their past behavior, capabilities, and expressions of intent, may be justified as a practice essential to the right of self-defense.”²⁹ In other words, according to Scott, espionage is “okay.”

Like Demarest, however, Scott might also be better placed in the third group, those who believe espionage is neither illegal nor legal. Scott, identifying a “classic double-standard,”³⁰ argues that most states, while they conduct espionage and expect that it will be conducted against them, reserve the right to prosecute people who commit espionage within their territory.

Demarest and Scott are right to hedge. Under international law, if something were truly legal (or at least not illegal), no state should prosecute those who do it. Neither Demarest nor Scott is willing to go that far in defending espionage, and rightly so.

B. Espionage is Illegal

In the opposing camp, Professor Manuel Garcia-Mora believes that “peacetime espionage is regarded as an international delinquency and a violation of international law.”³¹ Professor Quincy Wright, for another,

26. Cmdr. Roger D. Scott, *Territorially Intrusive Intelligence Collection and International Law*, 46 A.F. L. REV. 217, 218 (1999).

27. *Id.*

28. *Id.* at 224.

29. *Id.* at 225.

30. *Id.* at 226.

31. 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).

believes peacetime espionage violates a duty that states have under international law “to respect the territorial integrity and political independence of other states.”³²

Ingrid Delupis comes out even more strongly against the legality of espionage. According to Delupis, “espionage appears to be illegal under international law in time of peace if it involves the presence of agents sent clandestinely by a foreign power into the territory of another state.”³³ Her definition of espionage, however, turns on the nature of the clandestine activity. What is not clear in Delupis’ account is whether “clandestine” includes intelligence officers who enter a country under the false pretense of being diplomats (using diplomatic passports with the local immigration authorities) or whether she would limit the definition to those who, unknown to the local authorities, sneak into the country. Either way, Delupis makes the further qualification that espionage is not by itself an international crime.³⁴ Here she draws a fine distinction between behavior that is contrary to international norms and behavior that constitutes a crime. International crimes are acts that can be prosecuted before an international tribunal: genocide, torture, or other war crimes. To her knowledge, international tribunals, whether in Nuremberg, The Hague, or elsewhere, have not indicted or convicted anyone for the simple wrong of espionage.³⁵

So, it seems that even those who take a hard line against espionage add qualifications to their views. Between the apparent chasm separating the first and second groups, there is much room for subtlety and nuance.

C. Espionage is Neither Legal Nor Illegal

Two former CIA officials, Daniel Silver and Frederick Hitz, state that “[t]here is something almost oxymoronic about addressing the legality of espionage under international law.”³⁶ That is an authoritative view, packed into one page in a national security casebook, from a former General Counsel and a former Inspector General at the CIA. Speaking of the “ambiguous state of espionage under international law,”³⁷ they conclude that espionage is neither clearly condoned nor condemned under

32. Demarest, *supra* note 19, at 338 (citing Quincy Wright, *Espionage and the Doctrine of Non-Intervention in Internal Affairs*, in *ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW*, *supra* note 17, at 12).

33. Ingrid Delupis, *Foreign Warships and Immunity for Espionage*, 78 AM. J. INT’L L. 53, 67 (1984).

34. *Id.* at 68.

35. *See id.*

36. Daniel B. Silver, *Intelligence and Counterintelligence*, in NATIONAL SECURITY LAW 935, 965 (John Norton Moore & Robert F. Turner eds., 2d ed. 2005) (updated and revised by Frederick P. Hitz & J.E. Shreve Ariail).

37. *Id.*

international law. The rules and the ethics are situational. Countries are much less tolerant when espionage is committed against them than when they are committing it against friends and foes. Whether espionage is legal or illegal under international law, they are realistic about the fact that countries, for reasons of self-defense and for their own interests, are going to commit espionage in other countries. According to Silver and Hitz, that may explain why no treaties or conventions specifically prohibit espionage.

Another commentator, Christopher Baker, places his view of espionage in the third, in-between category. As he argues, “international law neither endorses nor prohibits espionage, but rather preserves the practice as a tool by which to facilitate international cooperation.”³⁸ Harking back to another era when the Americans and Soviets negotiated over the size of their nuclear stockpiles, Baker demonstrates that shared intelligence can be very useful in monitoring and enforcing agreements on arms control. “Without espionage,” Baker claims, “countries could be required simply to accept the information provided by other treaty partners as accurate.”³⁹ Clearly, that will not suffice.

President Kennedy, so Baker hints, had a broader range of policy options during the Cuban Missile Crisis because of good human and technical penetrations into developments in Cuba. Further, Baker argues that this “functional” approach to espionage will assist international cooperation in dealing with many other problems. Today those include terrorism, pollution, international trafficking of narcotics, the spread of diseases such as AIDS and SARS, ethnic conflicts, and illegal migration.

Professor Simon Chesterman, a contributor to this symposium, agrees that espionage creates functional benefits for the international community, and he further suggests that the benefits of sharing intelligence with multilateral organizations could lead the international community to develop new international norms.⁴⁰ In particular, Chesterman points to the beneficial use of shared intelligence in presenting the case for preemptive military action,⁴¹ justifying targeted financial sanctions against persons and groups,⁴² and supporting international criminal prosecutions.⁴³ While Chesterman is modest in his suggestions, he should be more modest in his conclusions. These examples simply show that a

38. Christopher D. Baker, *Tolerance of International Espionage: A Functional Approach*, 19 AM. U. INT'L L. REV. 1091, 1092 (2004).

39. *Id.* at 1105.

40. Simon Chesterman, *The Spy Who Came in From the Cold War: Intelligence and International Law*, 27 MICH. J. INT'L L. 1071, 1099–1100 (2006).

41. *Id.* at 1101–08.

42. *Id.* at 1109–20.

43. *Id.* at 1120–26.

state will cooperate in sharing intelligence when doing so serves a particular interest. One-off deals, however, are a very slow and indirect way to achieve international consensus on the legality of espionage. The gap is still there.

V. A STRING OF DUALITIES

Those who are inclined to let things be can stop here. Or, if they continue to be drawn to espionage, they can bounce back and forth along a string of dualities with me. The dualities go way back in history, and they apply to intelligence practices in many countries. My discussion of the U.S. example is just one string within the themes and variations from international practice. Contrary to an idealistic agenda, the dualities do not lend themselves to an overarching synthesis of the legality and morality of espionage.

A. *Heroes and Traitors*

People become spies in one of three basic ways. Some volunteer, some are recruited, and some join through a practice in between. Case officers, who measure themselves by how many “scalps” they have taken, tend to exaggerate how much they did to bring a spy into the fold. For instance, they claim recruitments where more objective observers would see volunteers. In any event, handling spies once they have crossed the Rubicon to the other side requires great skill. Case officers must conduct countersurveillance to ensure their meetings with the new spies in “safehouses” or other locations are not monitored through technical or human means. Mistakes are costly. If the countersurveillance fails, the spy or agent will be “rolled up,” meaning arrested, tortured, or executed.

All intelligence services perform surveillance and countersurveillance. These are related skills in the sense that the rabbit and the fox are all part of the same hunt. If a case officer cannot master these skills, she will be of little use to her service. Intelligence services may speak different languages around the world, but the language of surveillance and countersurveillance is uniform, a sort of espionage Esperanto.⁴⁴ Usually the case officers who handle spies do more countersurveillance than surveillance; their colleagues in counterintelligence might specialize in surveillance.

44. Law enforcement officers must also master these skills to the extent they run undercover operations (for instance, penetrating organized crime groups).

Case officers around the world must also be adept at various secret means of communication. These range from chalk marks to dead drops to highly sophisticated transmitters. If opposing services intercept these communications, consequences for the spies and their handlers can be as grave as countersurveillance gone bad. Lives are lost and reputations ruined.

The United States may be more advanced in the technology it uses for espionage, but the skills of espionage are generic and international. Foreign services can use their ingenuity to compensate for what they lack in technology. For example, some foreign services, without polygraph machines, use other means to determine whether candidates, employees, or sources are telling them the truth. Services in other countries are said to be better than the CIA at recruiting and handling human sources.⁴⁵

Espionage, like medicine or engineering, transcends the political constructs of international borders. The skills are certainly adjusted for local differences, but repairing a broken leg or building a bridge over a river, like assessing, developing, recruiting, and handling human sources of information, is very much the same all over the world. Espionage, as a professional pursuit, speaks an international language. For this reason, it does make some sense to speak of international standards of espionage. CIA officers and KGB officers had more in common with each other than they did with lawyers and accountants in their own countries. Intelligence officers are part of the same guild. The existence of implied espionage standards, however, does not automatically produce uniformity in international law concerning espionage. Trade practices and the laws of trade are not the same concepts.

Though the skills associated with espionage appear to transcend political boundaries, the morality of espionage stays local. Moral relativism is inherent in espionage. If an American officer, an Ames or a Hanssen, goes over to the other side, we call him a traitor. We prosecute him to the fullest extent possible.⁴⁶ But if someone from the other side, a Popov or a Penkovsky, comes to our side, we admire him. If he comes for ideological reasons rather than for money, we might even call him a hero. The memoirs of CIA officers speak with respect and admiration of Soviet

45. See JOSEPH E. PERSICO, *ROOSEVELT'S SECRET WAR* 203 (2001) (describing how MI5 turned its captured German spies during World War II, a thought that "never entered [President Roosevelt]'s head" when eight Germans were captured on American soil in 1942).

46. Both Ames and Hanssen, after accepting plea bargains, are serving life sentences. See e.g., Eric Lichtblau, *Former Air Force Analyst Convicted in Spy Case*, N.Y. TIMES, Feb. 21, 2003, at A17 (discussing the plea bargaining and sentencing of Robert. P. Hanssen); David Johnston, *How the F.B.I Finally Caught Aldrich Ames*, N.Y. TIMES, Jan. 27, 1995, at A18 (discussing the capture and fate of Aldrich Ames).

intelligence officers, whether from the KGB or GRU, who came to the Western side.⁴⁷ But the same memoirs vilify the Americans who helped the other side: from the Rosenbergs selling atomic secrets all the way to the John Walker family ring selling cryptographic machines and codes. This double-speak may simply be for public consumption. In private, sophisticated case officers must be aware of the paradoxes of their trade. This may explain why many case officers keep a personal distance from their sources, withholding their home phone numbers and using their cover names. Their volunteers and their recruitments, after all, are somebody else's traitors, a paradox not easily ignored.

Aldrich Ames, for example, did not express any remorse about the Soviet citizens who were executed after he revealed their identities to the Soviet services as CIA/FBI assets.⁴⁸ Ames considered them all players, like him, who knew the risks and the benefits of their game. The FBI turncoat, Robert Hanssen, walked in Ames's footsteps. Both Ames and Hanssen understood the rules. Living in two layers of shadows, they became rich and received encouragement from their Russian handlers as long as their true affiliations were not revealed to U.S. law enforcement. Once exposed, they would have found protection in Russia had they gotten out of the United States. Like Kim Philby, the British master of deceit, they would have been provided dachas and given access to the extra money that had been set aside for them in local accounts. Once revealed and arrested within American control, however, they faced execution and long terms of imprisonment. In the end, there was little the Russians could do for them. The same fate awaited the Russians who joined Team America. Although the skills of espionage transcend borders, the spy's physical location makes a huge difference when he is revealed, compromised, or "outed." In his original home, he will face severe consequences. In his new home, he will be treated well. For a spy, sometimes one international flight makes all the difference in the world.

The moral relativism inherent in international espionage creates a sort of moral equivalence among the intelligence services. Their activities are neither fully good nor fully bad. Any chance of moral advantage depends on the superiority of their political system. During World War II, for example, not much separated the German intelligence services from the Soviet services in the way they conducted their business. Both were professional, ruthless, and effective. Both services recruited spies in the other country. Good intelligence created slight advantages, but the

47. See e.g., RICHARD HELMS & WILLIAM HOOD, *A LOOK OVER MY SHOULDER: A LIFE IN THE CENTRAL INTELLIGENCE AGENCY* 131–32 (2003).

48. PETE EARLEY, *CONFESSIONS OF A SPY: THE REAL STORY OF ALDRICH AMES* 203–05, 347–50 (1998).

war was won and lost based on economic and military might. For such reasons, the Soviet services ended up with the winners, the German services with the losers. The amorality of espionage may have been part of the reason that, after the war, the Americans and the Soviets, without much compunction or hesitation, bid for the services of German intelligence officers and networks. They were hiring free agents who went beyond political systems.

B. *Inner Doubts*

Even the successful recruitment creates its own doubts. Nothing is as simple as it seems. To make sure the spy is not a double agent, penetrating operations and planting disinformation, the recruiting service will spend months checking the spy's "bona fides." This is standard practice. If the spy came over easily, that is a sign. If the spy came over despite great resistance, that is another sign. If the spy gives "chicken feed" or information that is already known, that is a sign. If the spy gives over "the crown jewels" or very useful information, that, too, is a sign. What these signs mean in the total equation is subject to endless debate, revision, and controversy. It is a form of espionage semiotics, and it is one of the reasons James Angleton, a former head of the CIA's counterintelligence branch, described espionage as a journey through a wilderness of mirrors.⁴⁹ It takes people, in a test of their sanity, into stranger universes than Alice's Wonderland. To this day, people will debate whether Yuri Nosenko was a true defector from the Soviet Union or a double agent sent to the United States to take us off the trail of supposed Soviet involvement in the Kennedy assassination. Angleton, to his grave, stuck with the double agent theory,⁵⁰ while most of his brethren went with the true defection.

In my opinion, John le Carré is masterful in displaying the moral ambivalence inherent in espionage. As the reader makes her way through *Tinker, Tailor, Soldier, Spy* to *The Honourable Schoolboy*, to *Smiley's People*, she realizes that not much separates the British spymaster, George Smiley, from his Soviet counterpart, Karla. Their methods and temperament are similar. They are alter-egos, the dual faces to the paradoxical craft of intelligence. As a guild within a guild, they have more in common with each other than they do with the lesser members of their organizations. They are lonely.

49. Jim Hoagland, *Spooking the CIA*, WASH. POST, Nov. 21, 2004, at B07. It is widely believed that Angleton borrowed this phrase from the T.S. Elliot poem "Gerontion," even though he claimed to have coined it. David C. Martin, Letter to the Editor, *The Origin of Quotes*, N.Y. TIMES BOOK REV., July 6, 1980, § 7, at 18.

50. JOSEPH J. TRENTO, *THE SECRET HISTORY OF THE CIA* 283–86 (2001).

Le Carré may not be popular with case officers because he holds up a mirror to their duplicitous profession. Consider Alec Leamas' self-reflection at the end of *The Spy Who Came in From the Cold*: "What do you think spies are: priests, saints and martyrs? They're a squalid procession of vain fools, traitors too, yes; pansies, sadists and drunkards, people who play cowboys and Indians to brighten their rotten lives. Do you think they sit like monks in London balancing the rights and wrongs?"⁵¹ By contrast, some case officers may prefer the tidiness of a James Bond movie. There, in a glamorous setting, with women in various stages of undress, it is obvious to all who the good guys are and who the bad guys are. But, for the rest of us, that clear casting of black and white from the movies does not convey the dull gray of what intelligence officers do in the shadows. For that, Le Carré has penetrated deeper into the soul of the spymaster than Ian Fleming has. For espionage, the truth is multi-faceted and contradictory, and it is not susceptible to straight rules and regulations.

If the spymaster has a soul, it must be a mystical one, a balancing of dualities and contradictions that goes beyond the conventional formulas of ordinary faith. His morality goes beyond good and evil. One might attempt a regulation that states that our case officers are good and that theirs are bad, but that would be risible to case officers and citizens with any self-awareness. Further, that would not lend itself to anything close to a loose international consensus which, at a bare minimum, is necessary for the regulation to become international law.

Slavery is wrong—on that there is an international consensus.⁵² The only consensus that exists concerning espionage is that sometimes it is right and sometimes it is wrong; it all depends on the circumstances. While paradox is acceptable in poetry, it is not a solid foundation for international conventions and treaties.

C. Domestic Activities and Foreign Activities

The U.S. system separates domestic intelligence and foreign intelligence. Since September 11, in both the domestic and foreign spheres,

51. JOHN LE CARRÉ, *THE SPY WHO CAME IN FROM THE COLD* 246 (1963)

52. E.g., U.S. CONST. amend. XIII, § 1; Universal Declaration of Human Rights art. 4, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948); see also Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331, 344 (explaining that "[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of international law"); *id.* art. 64 (explaining that the principle of *jus cogens*, or peremptory norms, places increasing limitations on state behavior in regards to human rights); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1987) ("[A] state violates international law [*jus cogens*] if, as a matter of state policy, it practices, encourages, or condones (a) genocide; (b) slavery or slave trade; (c) the murder or . . . disappearance of individuals; (d) torture . . . ; (e) prolonged arbitrary detention; [or] (f) systematic racial discrimination . . .").

countering terrorism has been our top priority. Threats to U.S. national security exist outside the United States in the form of radical Islamic groups and possibly inside the United States in the form of sleeper cells and sympathizers. Outside the United States, the CIA takes the lead. The CIA, however, by its charter and executive orders, is prevented from taking on an “internal security” function.⁵³ This prohibition was supposed to allay fears of an all-encompassing security institution. Inside the United States, therefore, the FBI and the relatively new Department of Homeland Security are the lead agencies. Yet, the lines between the domestic front and the foreign front are not always clear. The CIA is permitted, for example, to gather information that relates to threats to its domestic facilities. Such an exception, if interpreted too expansively, could erode the rule against the CIA operating on U.S. soil. Further, as the FBI expands the number of its overseas offices—through legal attachés in various U.S. embassies—the lines between the CIA and the FBI will blur even more.

The U.S. system seeks both competition and cooperation from its intelligence agencies. Two prominent areas of overlap and turf battles⁵⁴ are counterintelligence and the debriefing of Americans who have traveled overseas. The trend since September 11 has been to attempt to break down the wall between the CIA and the FBI so that the agencies share more information and personnel. This breaking down of walls, aided by the Patriot Act⁵⁵ and a decision from the Foreign Intelligence Surveillance Court of Review,⁵⁶ while good for operations, may well create imbalances in the protection of civil liberties.

Democracies are reluctant to concentrate too much of the intelligence function within one agency. Such concentration, even if it leads to more effective intelligence gathering, creates too much temptation for political leaders to use the security services against their political opponents. What we fear is something far worse than Richard Nixon’s “enemies list” of those who were to receive extra attention from the Internal Revenue Service. We fear the dirtiest tricks. A concentrated or

53. 50 U.S.C.A. § 403-4a(d)(1) (West Supp. 2006) (“The . . . Agency shall have no police, subpoena, or law enforcement powers or *internal security functions*.”) (emphasis added); see also Exec. Order No. 12,333, 46 Fed. Reg. 59941, 59945 (1981) (“[T]he CIA shall: [c]onduct counterintelligence activities outside the United States and, *without assuming or performing any internal security functions* . . .”) (emphasis added).

54. For a description of the CIA-FBI rivalry, see generally MARK RIEBLING, WEDGE: FROM PEARL HARBOR TO 9/11—HOW THE SECRET WAR BETWEEN THE FBI AND CIA HAS ENDANGERED NATIONAL SECURITY (2002).

55. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, §§ 201–25 (2001).

56. *In re Sealed Case No. 01-002*, 310 F.3d 717, 734–36 (FISA Ct. Rev. 2002).

consolidated intelligence function is, after all, a hallmark of oppression, more in line with the Cheka or the KGB than with the checks and balances of limited government. This reluctance to concentrate the intelligence function manifests itself in the United States in a split between domestic and foreign intelligence activities. Of course, even countries that do have a consolidated service (for instance, the former Soviet Union) usually separate their divisions for domestic security (more a police function) and foreign operations (the stuff of classic espionage). But the divisions in consolidated services occur within one agency, while the divisions in the intelligence services of democracies result in separate agencies that have their own leaders and different charters.

Most developed countries attempt to gather foreign intelligence, whether they do so through a consolidated service or a separate foreign service. Almost every developed country participates in the great intelligence game. From the perspective of each state's interest, it would be irresponsible to opt out of the game. The world is simply too dangerous for national leaders to turn a blind eye to external threats. The need for intelligence about one's neighbors and their political, military, and economic developments is paramount. In a faster and more integrated world, states can lose their competitive edge very quickly. As one country achieves a breakthrough in technology, another country closes the technological gap through state-sponsored theft. In a dog-eat-dog competition, even friends and allies spy on each other. Loyalty, if there is any, is to national interests, not to the international interest. Until the system of nation-states is replaced, until regional and international integration really take hold, intelligence services will be around to do their states' bidding.

National intelligence services are far from being integrated into regional command, such as with NATO's military model, or into an international peacekeeping function under, for instance, the auspices of the United Nations. Intelligence, along with the military, the economy, culture, and sports, remains just one more arena for national competition.

In the world's intelligence community, foreign intelligence services are most affected by the laws of other countries, and foreign intelligence services would be most affected by any international law or convention on intelligence activities. While domestic services fish in home waters, foreign services travel across boundaries and obstacles to fish in foreign waters. The CIA, like the foreign services of other countries, operates on every continent.

To do their jobs, the CIA and the FBI cannot limit themselves to domestic sources of information about foreign threats. When they seek accurate information about Iran's nuclear programs, sources in Tehran will be more useful than those in San Diego. A general rule of espionage is that the nearer the source is to the information it provides, the more valuable the information. On-site human sources can reveal the intentions of a country's leaders in a way that distant satellites cannot; those sources can get into the very minds of the officials. During the Cold War, the CIA sought sources in the Politburo. In the run-up to the Second Gulf War, the CIA scrambled for sources in Saddam Hussein's inner circle. Now, most potential Iranian assets with access to valuable information live in Iran, but the lack of a U.S. diplomatic presence in Iran makes recruiting assets there difficult. Fortunately, some Iranians—scientists and engineers and others—travel to the United States, a more promising place for the CIA or the FBI to pitch them.

Allowing Iranian scientists and engineers into the United States exposes another duality of espionage. From a counterintelligence perspective, it is a risk to let these people into the country because they could conduct terrorist acts here or gather information that they could use against us when they return home. From an intelligence perspective, however, having them here makes it easier for the FBI and the CIA to assess, develop, and pitch them as spies. Similarly, if the FBI and the CIA identify a traitor in their ranks, law enforcement officers might push for the traitor to be prosecuted in the interests of deterrence and retribution, while intelligence officers might try to use the traitor against the service that recruited him, feeding disinformation in a triple-agent operation. In the final analysis, nothing is clear-cut in espionage. Sometimes white seems like black and black seems like white. Sometimes white is white and black is black.

Returning to the Iranian example, the CIA cannot be binary in its activities. Some Iranians may travel to third countries, never setting foot in the United States. Wherever the potential sources wander, the case officers must follow, carrying the necessary bait, lures, and rods to hook and reel them in. Espionage is thus the ultimate form of fishing. To twist this metaphor, one must always remember that while CIA case officers are trying to hook sources, fishermen from other services are trying to hook our case officers. In the sea of possible sources, a case officer is a big catch because she usually has a bellyful of sources and smaller fish. An even bigger fish than a case officer would be the head of another service or another state.⁵⁷

57. Many in the Middle East have speculated that some of their leaders are on the CIA payroll.

Although the languages and home ports for the world's intelligence services are different, the principles of espionage are shared in common. Tradecraft, whether practiced by Americans, Britons, Israelis, Russians, Italians, or others, is much the same. At bottom, each service is trying to obtain access to other countries' secrets. The more sensitive the secret, the more highly placed the "catch," the more valuable it is to the service. "Friendly services" trade information they have gathered in "liaison operations."⁵⁸ Sometimes even enemies make deals.⁵⁹ To paraphrase John Le Carré, the international intelligence community is a trading pit for secrets, open twenty-four hours a day, every day of the year, on every continent.⁶⁰ Within that global market, nothing is barred. Nothing prevents us from spying on our enemies and nothing prevents friendly services from spying on each other. The Israeli recruitment of Jonathan Pollard, when he was with the U.S. military, is a case in point. Almost all is fair game in espionage. The Israelis may forthrightly "declare" their intelligence officers to U.S. authorities in the Washington embassy—and then sneak in additional officers under deeper cover.

Sometimes services are split beyond the traditional divide between domestic and foreign intelligence functions. The United Kingdom and the United States, for example, both further divide the domestic function, though they do so differently. While the American FBI houses law enforcement and intelligence activities, the British separate national law enforcement (namely, Scotland Yard) from the gathering of domestic intelligence (through MI5). This separation, which is not uncommon in the rest of Western Europe, has inspired many calls for reform in the United States, especially from those who believe the FBI will never adapt to its new role of preventing terrorist attacks.⁶¹

58. The United States and the United Kingdom have a special relationship that dates from the British role in establishing the U.S. Office of Strategic Services during World War II. See generally CHRISTOPHER ANDREW, *FOR THE PRESIDENT'S EYES ONLY: SECRET INTELLIGENCE AND THE AMERICAN PRESIDENCY FROM WASHINGTON TO BUSH 1-2*, 131-35 (1996) (discussing the admiration President Franklin Delano Roosevelt had for British intelligence operations). "Roosevelt's most important personal contribution to the development of the wartime intelligence community, apart from the creation of the OSS, was to approve intelligence collaboration with Britain on an unprecedented scale." *Id.* at 135.

59. For example, although Syria causes the United States much trouble in the Middle East, it has been reported that the Syrian services, in a program of extraordinary rendition, have cooperated with the CIA in the aggressive interrogation of suspected terrorists. See Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, *NEW YORKER*, Feb. 14, 2005, at 106-07 (describing the plight of Maher Arar, a Canadian national, who was rendered to Syria for interrogation because the U.S. government suspected him of being a terrorist).

60. Trailer Interview with John Le Carré, *TINKER, TAILOR, SOLDIER, SPY* (Acom Media 2004).

61. See RICHARD A. POSNER, *PREVENTING SURPRISE ATTACKS* 169-97 (2005) (discussing hurdles to the FBI becoming a proficient domestic intelligence service). See also WILLIAM

D. *Inner Divisions*

The CIA gathers foreign intelligence primarily from operations outside the United States. So, for the CIA, the “spy-versus-spy” aspect of espionage occurs when officers in the Directorate of Operations operate on foreign soil against the counterintelligence branches of other countries. In this regard, some cities have been recognized as international centers for spying: Berlin, Vienna, London, Lisbon, and others. Spy novels and movies, for this reason, are accurate on a basic point: wherever influential people go, case officers will follow. Wherever case officers go, other case officers will follow.

Outside the United States, the CIA is mainly on offense, prowling for information. Back at headquarters in McLean, Virginia, the CIA is often on the defense. There the many CIA employees and other government officials with access to classified information work together to coordinate and assist their colleagues in the field on foreign operations. Meanwhile, opposing intelligence officers in the American field might be searching for secrets under the cloak of diplomatic immunity or, even more dangerously, lurking well outside diplomatic circles. Wherever the threat originates, the CIA must keep house.

Because foreign intelligence takes espionage across international borders, it might seem to open up space for customary international law. Although I remain skeptical that international law can reasonably apply to intelligence activities, domestic or foreign, I do recognize that intelligence conventions and treaties might turn their attention to the regulation of foreign activities. One strong draw is that foreign services are more uniform in their conduct than are domestic services. As a parallel, think of the uniformity of Hilton hotels around the world as compared to the diversity of local inns, guesthouses, and beds and breakfast. Scholars other than myself may note this uniformity and feel compelled to impose it even more rigidly on intelligence activities. No matter—for all services, the rules of the game are quite simple: we spy on them while they try to keep us out, and they spy on us while we try to keep them out. In other words, each side plays both offense and defense.

E. *The Limits of Law*

U.S. law is more comprehensive concerning domestic intelligence activities than foreign intelligence activities. In response to the Supreme

E. ODOM, *FIXING INTELLIGENCE FOR A MORE SECURE AMERICA* 180–82 (2d ed. 2003) (suggesting the creation of a U.S. domestic intelligence service similar to the United Kingdom’s MI5).

Court's decision in *Keith*,⁶² which stated that warrantless surveillance of a CIA facility in Ann Arbor, Michigan, violated the Fourth Amendment, Congress passed the Foreign Intelligence Surveillance Act (FISA)⁶³ to regulate the gathering of foreign intelligence within the United States. Under this statute, the executive branch must obtain authorization for searches and electronic surveillance for national security purposes via secret court proceedings. For years, FISA was the exclusive means by which the FBI, CIA, and other U.S. agencies could gather foreign intelligence through searches and electronic surveillance within the United States, until President Bush ordered the National Security Agency after September 11 to conduct surveillance of phone calls, emails, and other communications suspected to be connected to al Qaeda without first obtaining warrants through FISA. Note, however, that FISA does not apply to searches and surveillance conducted outside the United States. So, although some constitutional protections may accompany U.S. citizens overseas, U.S. law gives its intelligence services a much freer rein when they conduct activities away from the homeland. In short, as one more duality, we tolerate some behavior only so long as it does not occur at home.

The CIA, learning from the excesses that were revealed in the Church Committee and other congressional hearings in the mid-1970s, makes great efforts to comply with U.S. law. The CIA's Office of Inspector General is now active, and the Office of General Counsel has expanded. Even so, the CIA, as a stealer of secrets, is not overly concerned with the laws of other countries. In fact, American case officers routinely encourage other people to break the laws of those countries.

As a lawyer at the CIA, I helped the Agency and its officers to keep their operations, abroad and at home, consistent with the U.S. Constitution, relevant executive orders, and internal regulations. Many of these regulations are classified annexes to public executive orders, only to be seen by those with security clearances. But the CIA cannot snap its fingers and make all the paperwork go away. The statutes and classified regulations, like much else in U.S. law, do not have carve-outs for the CIA; its lawyers work with lawyers in other agencies, who are usually cleared for limited purposes, to accomplish both important and mundane tasks. The CIA, though viewed as a "rogue elephant" by its detractors, is not above all law.

62. United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297 (1972) (referred to as *Keith* case after the first judge to hear it, Damon J. Keith).

63. Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified at 50 U.S.C.A. §§ 1801-62 (West 2006)).

To remain in compliance with U.S. law, CIA lawyers must master various legal sub-fields: ethics, federal contracting rules, and environmental regulations, among others. These lawyers, however, do not need to develop any expertise in the domestic laws of other countries; the CIA takes for granted that its operations will violate an array of foreign laws. Since the CIA conducts global operations, it probably violates the laws of most countries in the UN General Assembly. Similarly, many countries in the General Assembly are currently violating U.S. law, trying to pry our secrets from the public and private sectors.

The split between domestic and foreign operations for U.S. intelligence agencies parallels a split in the legal advice the CIA receives: the CIA's lawyers make great efforts to keep the CIA in compliance with our domestic laws, but the same lawyers are blissfully indifferent to foreign laws. Unlike corporate lawyers in New York and Washington, CIA lawyers do not need to retain or consult local counsel to make their international deals happen.

Intelligence officers often enter other countries with false documents and under false pretenses. They do not reveal their missions to foreign authorities. If they did, depending on the circumstances, they would be denied entry, returned as *personae non gratae*, or prosecuted. Intelligence personnel go overseas to assist those who are committing espionage or to convince others to "conspire" against their own countries. It would be difficult, if not impossible, for the CIA to accomplish its mission if it were required to comply with foreign countries' laws. As necessary, CIA officers overseas break into premises; they lie and steal. That is what we train them to do. They are promoted for conduct that would put them in prison if done in the United States.

The hope for the U.S intelligence community is that the beast can be contained. That is, we hope that the lawlessness will remain outside U.S. jurisdiction. The CIA's "black bag" jobs, which it conducts in capitals around the world, are supposed to be off limits in our own capital. Outside the United States, the CIA prowls the alleys without a leash. Inside the United States, the CIA is supposed to behave as a domesticated animal. As we learned during Watergate, however, sometimes CIA officers stray from the leash. Among the Watergate burglars was a former CIA officer, E. Howard Hunt. And since September 11, many fear the CIA has strayed even further.

F. Espionage Statutes

U.S. statutes reflect the domestic/foreign duality of espionage. If an employee is caught carelessly walking out of CIA headquarters with a top-secret document, he may lose his security clearance and his job. If an

employee walks out of Langley, not out of carelessness, but with the intent to sell the document to a foreign intelligence service, he will have stepped into the purview of treason and the espionage statutes.⁶⁴ Because traitors are treated harshly, he will be risking his life. On the other hand, if an American case officer can enter FSB⁶⁵ headquarters in Moscow and walk out with secret Russian documents, he will receive enthusiastic praise and a medal from his colleagues. The act of walking out with a document is the same, but, depending on the intent and on the location, the consequences can be quite different.

It is possible for U.S. espionage statutes to be amended to have full extraterritorial effect; the United States could make it a crime for its citizens to steal military, diplomatic, and intelligence secrets from other countries. But the reward for such self-righteousness would be mockery and disbelief. Other states would not then preclude their intelligence services from stealing secrets from foreigners and foreign governments. Even if they took that step, they would not enforce the preclusion.

U.S. espionage statutes could be extended in a more limited fashion to private citizens, keeping personal frolics separate from authorized missions. Accordingly, a private citizen who did not have authorization from the U.S. government could be prosecuted for stealing a document from the FSB. Yet, again, I doubt that other countries would reciprocate by extending their espionage statutes to cover the stealing of American secrets by their private citizens. As the United States is not likely to constrain itself in ways that others will not, I doubt that even this limited extension of the espionage statutes has a chance of reaching international consensus.

G. Extraditable and Non-Extraditable Offenses

The transfer of suspects and convicts from one country to another can be undertaken formally, through the courts and foreign ministries of the sending and receiving states (extradition), or informally, without the courts (irregular or extraordinary rendition). Under customary international law,

64. *E.g.*, 18 U.S.C. §§ 793–98 (prohibiting the collection, transfer, sale, or loss of “defense information” for the purpose of using the information either to injure the United States or benefit a foreign nation); Economic Espionage Act, Pub. L. No. 104-294, 110 Stat. 3488 (codified as amended at 18 U.S.C. §§ 1831–39) (2006) (prohibiting the collection, duplication, possession, transfer, or sale of trade secrets for the purpose of using the trade secret to benefit a foreign nation or anyone other than the United States); 50 U.S.C § 783(b) (2006) (prohibiting the receipt or attempted receipt by a foreign agent of classified information from any U.S. government officer or employee).

65. The Federal Security Service (FSB) of the Russian Federation is a successor to the KGB.

states may have some duty to cooperate on extraditions.⁶⁶ Extraditions are usually conducted according to bilateral or multilateral treaties. These treaties spell out the great discretion sending states have in turning down a request for extradition. The treaties usually require that the criminal offense that serves as the basis for the request be a crime in the sending country as well. Thus, states may refuse to extradite a suspect to the United States if the only charge is a violation of the Foreign Corrupt Practices Act,⁶⁷ a statute that does not exist in comparable form in many other jurisdictions. Further, the treaties usually provide that a suspect will not be extradited for a “political offense.” The United States has, for example, refused to extradite Irish suspects accused of taking part in IRA activities back to the United Kingdom.⁶⁸

Extradition treaties therefore provide some evidence of crimes that have reached the level of international consensus. For the purpose of this Essay, we might ask whether suspects accused of espionage are readily extradited from one country to another. If they are, that would suggest an international consensus on the criminality of espionage. If they are not—and espionage is treated more like a political offense—that would suggest international disagreement or a contradiction between domestic norms and international norms. That contradiction would help prove this Essay’s thesis. By now, it should come as no surprise that some proof is already there.⁶⁹ In the case of Abu Omar, for example, the Italians are seeking the extradition of CIA officers, not for committing espionage in Italy, but for allegedly kidnapping the radical Muslim cleric from the streets of Milan.⁷⁰ Kidnapping, but not espionage, is an international crime.

H. Legals and Illegals

International law does affect one aspect of international espionage. Some case officers, pretending to be employed by some agency other

66. See Hernan de J. Ruiz-Bravo, *Monstrous Decision: Kidnapping is Legal*, 20 HASTINGS CONST. L.Q. 833, 853 (1993) (stating that customary rules of international law pertaining to extradition have emerged through the execution of hundreds of extradition treaties between countries; even if certain provisions common to such treaties are not included in a particular treaty, “they still exist as rules of international customary law”).

67. Pub. L. No. 95-213, 91 Stat. 1494 (1977), as amended by the Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, 102 Stat. 1415 (1988).

68. See, e.g., *United States v. Duggan*, 743 F.2d 59 (2d Cir. 1984).

69. See García-Mora, *supra* note 31, at 83 (“[T]he point is generally accepted that treason, sedition and espionage fall in the category of purely political offenses . . . since they affect the peace and security of the State without in any way violating the private rights of individuals.”).

70. *Former CIA Operative Refuses to Cooperate in Rendition Case*, CHI. TRIB., Jan. 10, 2007, at C10 (reporting that an Italian prosecutor has requested extradition of CIA suspects, but the Italian government has not yet ruled on the request).

than their intelligence service, travel overseas under diplomatic immunity. They are declared as diplomats to the receiving country's foreign ministry and placed on the diplomatic roster. If diplomats are caught performing espionage (which is not, of course, on the Vienna Convention's list of permitted diplomatic activities), the worst that can happen to them, pursuant to the Vienna Convention, is that the receiving country can declare them *persona non gratae* and expel them from the country.⁷¹ During the Cold War, expulsion of Soviet case officers from the United States often led to Soviet reprisals. In the practice of international espionage, this is a common practice of tit for tat.⁷²

Diplomatic immunity therefore protects both legitimate diplomats and case officers posing as diplomats from being ensnared by the domestic laws of the receiving country. Separate from espionage, think of a legitimate diplomat who, in a drunken state, kills a pedestrian on the streets of Washington, D.C. Unless his home country waives his immunity, the United States could not prosecute him. Even so, diplomatic immunity does not legalize what he has done; on his return home, he might be prosecuted for what most people would recognize as a wrong. Espionage has a different nuance. Diplomatic immunity does not legalize the case officer's practice of espionage. But if a case officer is caught and returned home, at most, he will be punished in an administrative setting for professional incompetence. He will not be criminally charged for doing his job.

Affording a case officer diplomatic protection has disadvantages, however. To have diplomatic immunity, he must be on the receiving country's diplomatic roster. The receiving country's intelligence and security services routinely assume, unless confirmed otherwise, that everyone on the list, no matter the formal designation, is an intelligence

71. Vienna Convention on Diplomatic Relations art. 9(1), Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95. There is some indication that a few state authorities have prosecuted foreign "diplomats" for espionage, not considering the spy activities to fall within the scope of "official functions" protected by diplomatic immunity. Swiss authorities, according to Joan Donoghue, prosecuted "a former diplomat who had allegedly committed espionage while accredited to Switzerland." Joan E. Donoghue, *Perpetual Immunity for Former Diplomats? A Response to "The Abisinio Affair: A Restrictive Theory of Diplomatic Immunity?"*, 27 COLUM. J. TRANSNAT'L L. 615, 627 (1989). This Swiss example is the exception, not the rule. Such prosecution invites retaliatory prosecution by other countries, something that goes against broad protection for diplomats for real or trumped-up charges.

72. See Chesterman, *supra* note 40, at 1089; Christopher Marquis, *Striving to Punish Cuba, U.S. Expels 14 of its Diplomats*, N.Y. TIMES, May 14, 2003, at A11; David Rohde, *Indian Diplomats Expelled*, N.Y. TIMES, Jan. 24, 2003, at A6; Paul Lewis, *France Ousts 3 Soviet Diplomats It Calls Spies*, N.Y. TIMES, Apr. 3, 1987, at A7; Seth Mydans, *Moscow Expels an American Diplomat as Spy*, N.Y. TIMES, June 15, 1985, § 1, at 13; Bernard Gwertzman, *Afghans Expel 2 U.S. Diplomats*, N.Y. TIMES, Sept. 16, 1983, at A5; Serge Schmemmann, *Soviet Orders a U.S. Diplomat Expelled on Charge of Spying*, N.Y. TIMES, June 5, 1983, § 1, at 114.

officer. As a part of standard tradecraft, they will check his background and conduct surveillance. The FBI, which has primary counterintelligence responsibility within the United States, does this with diplomats who are declared to our State Department. The scrutiny and surveillance obviously make it difficult for the case officer to conduct his espionage business. Diplomatic immunity therefore limits his effectiveness. For this reason, many intelligence services place case officers into foreign countries without diplomatic immunity. Those officers do not stand out as diplomats, making it easier for them to maintain some cover for their intelligence activities. Far away from their embassies, they can pretend to be business consultants, members of nongovernmental organizations, or tourists.⁷³

In the parlance of international espionage, those without diplomatic immunity are often labeled "illegals." Properly understood, this labeling should not create any confusion about the effects of domestic or international law on espionage. Any case officer's activities, whether done under diplomatic immunity or not, are illegal in the receiving country. The simple difference between the "illegal" and the "legal" is that, if caught, the former may be prosecuted abroad while the latter may not. Even so, some states acknowledge at a later date illegals who have been caught and prosecuted in other states, and their returns are negotiated. Not all illegals are left to rot, disavowed as intelligence officers or facilitators. For example, after the Soviets shot down a U-2 aircraft in 1960, President Eisenhower put aside a CIA cover story about weather problems and eventually acknowledged that the pilot, Francis Gary Powers, was performing a surveillance mission. In 1962, the United States negotiated Powers' release to the United States in a trade for the Soviet illegal, Rudolf Abel, who had been captured by U.S. authorities.

Like Powers, a captured illegal case officer can become a bargaining chip in negotiations between states. The two states, as occurred more than once between the United States and the Soviet Union during the Cold War, can trade illegals and dissidents, and those trades can lead to dramatic exchanges in places like Berlin. Those trades are, at a minimum, a tacit acknowledgement that the traded person was an intelligence officer or someone important enough to justify the home country's interest in participating in the trade.

73. Michael T. Clark, Comment, *Economic Espionage: The Role of the United States Intelligence Community*, 3 J. INT'L LEGAL STUD. 253, 267-68 (1997) (discussing potential advantages of using intelligence sources not connected to official cover).

VI. FINAL VERSES

Around and around we go with the second oldest profession. What we do to them is “gathering intelligence”—something positive, worthy of praise. What they do to us is “performing espionage”—something negative, worthy of punishment. But without the negative sign that depends on the circumstances, X equals X. Gathering intelligence is just the flip side of performing espionage, and performing espionage is just one part of a country’s broader effort for survival. Beyond any international consensus, countries will continue to perform espionage to serve their national interests. Negative or positive, it all depends on who does what to whom. International law does not change the reality of espionage.