Vanderbilt Journal of Transnational Law

Volume 5
Issue 2 *Spring 1972*

Article 13

1972

Espionage in Transnational Law

Leslie S. Edmondson

ESPIONAGE IN TRANSNATIONAL LAW

I. INTRODUCTION

Traditionally, spies have been defined as "secret agents of a State sent abroad for the purpose of obtaining clandestinely information in regard to military or political secrets."[1] Older authorities have stated emphatically that the gravamen of espionage is the employment of disguise or false pretense.[2] Such deception has been the justification for visiting the severest of penalties upon the captured spy.[3] Curiously, however, the employment of spies has not been considered reprehensible conduct.[4] The refusal to officially acknowledge the commissioning of a spy operated to relieve the government of any responsibility either to the offended state or to the secret agent.[5] As a result, espionage in the classic sense can be characterized in two distinct ways: as to the nation, it was an extraterritorial act of state for which the state was not responsible; as to the agent, it was an intentional act of deception which rendered him personally and criminally liable to the offended government.

The industrial revolution of the past century coupled with the rapid technological advancement of the present have placed great strains on the definition, as well as on the dual nature, of espionage. Beginning at least as early as the Franco-Prussian War of 1870, the concept of control of information began to weigh heavily in the minds

1. 1 L. OPPENHEIM, INTERNATIONAL LAW 510-11 (2d ed. 1912). *See also* H. HALLECK, INTERNATIONAL LAW 406 (1861).

2. W. HALL, A TREATISE ON INTERNATIONAL LAW 535 (6th ed., J. Atlay ed. 1909); H. HALLECK, *supra* note 1, at 406. More recently, the same conclusion has been reached by several authorities. *E.g.*, 3 C. HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1863 (2d rev. ed. 1947); M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 559 (1961).

3. W. HALL, *supra* note 2, at 535 ("the ignominious death of hanging"); H. HALLECK, *supra* note 1, at 407 ("an ignominious death").

4. Governments have always been free to accept gratuitous offers of another nation's secrets, even though the informant was compensated. Nineteenth century authorities, however, divided over whether a nation could legitimately encourage an individual to commit the odious act of espionage. H. HALLECK, *supra* note 1, at 409 (referring to the issue as a "question of ethics"). Both Hall and Oppenheim unqualifiedly state that the employment of spies is legitimate. W. HALL, *supra* note 2, at 535; 1 L. OPPENHEIM, *supra* note 1, at 511.

5. 1 L. OPPENHEIM, *supra* note 1, at 511.

of those responsible for national security. Count Bismark took the position that an English ballonist was triable as a spy because he "crossed our outposts and positions in a manner which was beyond the control of the outposts, possibly with a view to make use of the information thus gained, to our prejudice."[6] The Russian Government took a similar view in 1904. It stated its intention to regard neutral news correspondents as spies should they "communicate war news to the enemy by means of improved apparatus not yet provided for by existing conventions" and to seize "as lawful prize" any vessel operating within the zone of military operations that was provided with wireless apparatus.[7] These pronouncements make clear that the essence of spying is not false pretense, but simply unauthorized disclosure. Consequently, the concern for inability to control the flow of information has taken precedence over protection against deception as the principal concern of modern states.

This change in the way governments view espionage has had three demonstrable effects on the classic categorization. First, the principal-agent relationship has become irrelevant. At one extreme, espionage is not necessarily an act of state at all, but may be the independent, gratuitous act of an individual. At the other extreme, espionage may be so intimately related to a normal state activity that it can be viewed entirely as the act of the nation.[8] Secondly, the requirement of scienter has been broadened and to some extent changed. The classic intent to collect for the purpose of delivery has been severed into two distinct scienter requirements. Each may satisfy the definition of espionage so that collection and dissemination are independently covered. In addition, a new, rather ill-defined scienter has emerged which states apply to each other and may apply to individuals as well. It resembles a presumption of intent and is related to the state's inability to control fully the flow of information. For example, the neutral news correspondent in 1904 was to be treated like a spy because he was beyond the control of Russian forces and capable of relaying vital information to the Japanese. Finally, in a limited sense the state has become accountable for its espionage activity not only to the other state but also to its agent and perhaps to third parties as well. In many situations it is no longer possible for the nation engaged in espionage to deny the existence of its spy. The downing of the U-2

6. W. HALL, *supra* note 2, at 536.

7. 7 J. MOORE, A DIGEST OF INTERNATIONAL LAW 233-34 (1906). The Prussian and Russian positions were criticized severely by both scholars and governments of the period. *See, e.g.*, W. HALL, *supra* note 2, at 536-37; 7 J. MOORE, *supra*, at 234.

8. An obvious example is the "spy satellite."

aircraft piloted by Francis Powers is such an illustration.[9] In these situations both nations involved must abandon the traditional practice of international law that was founded on a policy of nonrecognition. The nation commissioning the spy may face grave diplomatic repercussions as a result of the undeniable espionage. On the other hand, the nation being spied on has little customary international practice to guide its reaction to the unfriendly act of another state.

While international law has been noticeably remiss in solving the conceptual problem of espionage, municipal law has in large measure filled that void. Modern legislation is based on the need to protect vital security information from intentional compromise. Deception is conspicuously absent as an element of the crime, and the scienter requirement is sufficiently broad to exclude agency as a necessary prerequisite to successful prosecution.[10] Moreover, in the last 50 years espionage prosecutions have given states the opportunity to weigh the national security interests reflected in local espionage statutes against other competing social values. The result of this municipal activity has been the development of a stable body of law and practice that reflects an accommodation between the needs of national security and other deep-seated values.

International law, in comparison, has not undergone such a development. Antiquated rules remain rigid. A distinction is drawn between peacetime espionage and wartime spying. While espionage between belligerents is an accepted part of the law of war, espionage in time of peace is best described as unrecognized. Modern relationships and technology, however, have forced the international system to abandon its policy of nonrecognition of peacetime spying. Executive action has proved to be the primary vehicle through which nations are now adjusting themselves to the important role that espionage plays in international relations. States, through their executives, have used municipal law as the foundation upon which to structure their response to problems unsolved by international law. Executive action is establishing the degree and the extent of responsibility that states will assume as a result of their extraterritorial activity. In short, precedents are being created that on the one hand recognize espionage as a permissible state activity in time of peace and on the other set bounds to the conduct of espionage. In the following

9. *See generally* Wright, *Legal Aspects of the U-2 Incident*, 54 AM. J. INT'L L. 836 (1960).

10. United States v. Heine, 151 F.2d 813 (2d Cir. 1945), *cert. denied*, 328 U.S. 833 (1946). *Compare* Articles of War, art. 82, 39 Stat. 619, 633 *with* 18 U.S.C. §§ 793-94 (1970).

discussion Part II will outline the existing rules of international law and indicate some of the developments that are currently taking place. Part III will then explore municipal legislation, judicial interpretations and executive prerogatives, principally of the United States, with a view toward understanding the role that local law is playing in this development.

II. INTERNATIONAL LAW OF ESPIONAGE

A. *The Law of War*

The right of belligerents to employ spies has been recognized since ancient times[11] and is accepted today as a legitimate "ruse of war."[12] Consequently, the belligerent who employs spies does not violate the law of war,[13] and members of the belligerent army or government may not be prosecuted as war criminals for the employment of espionage agents.[14] No distinction is drawn between the use of civilians, of whatever nationality, or of military personnel. Governments may engage sympathetic civilians of the opposing belligerent as spies even though such conduct on their part may be treasonous.[15] Moreover, the conduct of the spies themselves is not violative of the law of war, although such conduct may contravene the municipal law or the law applicable to the armed forces of the opposing belligerent.[16] Thus, both the espionage agent, as well as his principal, engage in an accepted mode of warfare consonant with the law of war.

---

11. H. GROTIUS, DE JURE BELLI AC PACIS, Book III, Ch. IV, § xviii, at 655 (F. Kelsey transl., Oxford University Press ed. 1925).

12. H. HALLECK, *supra* note 1, at 406; Baxter, *So-Called 'Underprivileged Belligerency': Spies, Guerrillas, and Saboteurs,* 28 BRIT. Y.B. INT'L L. 323, 330 (1951). Oppenheim distinguishes espionage from other ruses of war and states that the acceptance of spying arises out of the military necessity to acquire information in order to wage war. 2 L. OPPENHEIM, *supra* note 1, at 196.

13. W. HALL, *supra* note 2, at 535; H. HALLECK, *supra* note 1, at 406; 2 L. OPPENHEIM, *supra* note 1, at 197.

14. Trial of Skorzeny, 9 War Crimes Reports 90 (1949).

15. 2 L. OPPENHEIM, *supra* note 1, at 197, 313. *See also* Baxter, *supra* note 12; Garcia-Mora, *Treason, Sedition and Espionage as Political Offenses Under the Law of Extradition,* 26 U. PITT. L. REV. 65 (1964).

16. Baxter, *supra* note 12, at 332; McKinney, *Spies and Traitors,* 12 ILL. L. REV. 591, 599 (1918). *Contra,* 3 C. HYDE, *supra* note 2, at 1865; *cf. Ex parte* Quirin, 317 U.S. 1 (1942) *noted in* Hyde, *Aspects of the Saboteur Cases,* 37 AM. J. INT'L L. 88 (1943); 2 L. OPPENHEIM, *supra* note 1, at 314.

Although there is no restriction on the type of agent that a belligerent may employ, international law differentiates between two classes of agents for purposes of treatment upon capture. A "belligerent spy" is an officer or soldier of a hostile army who clandestinely obtains or seeks to obtain information within the zone of military operations [17] for the use of his army. [18] A "non-belligerent spy" is either a civilian agent of a belligerent state secretly operating anywhere, or a military spy secretly operating within the interior of the opposing belligerent nation. [19]

A captured belligerent spy is denied prisoner-of-war (POW) status. [20] The penalty exacted for being captured is usually death, although such severity is not required by international law. [21] Article 30 of the Hague Regulations requires that captured spies be tried before sentence is executed. It is questionable, however, whether the

17. The "zone of operations" is the phrase used in article 29 of the Hague Regulations to distinguish the theater of war from the interior of the belligerent nation. This distinction has never been defined with any precision and under modern warfare probably serves no useful function. *See Ex parte* Quirin, 317 U.S. 1 (1942) (distinction not mentioned although military spies and saboteurs were captured in Chicago and New York); United States *ex. rel.* Wessels v. McDougal, 265 F. 754, 763 (E.D.N.Y. 1920) (New York City defined to be within the "zone of operations" during World War I); M. McDOUGAL & F. FELICIANO, *supra* note 2, at 559; Baxter, *supra* note 12, at 332.

18. HAGUE REGULATIONS, art. 29.

19. *See* Koessler, *The International Law on the Punishment of Belligerent Spies: A Legal Paradox,* 5 CRIM. L. REV. 21 (1958); McKinney, *supra* note 16, at 591. No attempt is made to categorize the various types of belligerents other than spies. Of course, for example, a single individual may be both a spy and a guerrilla. Moreover, each of the classifications may have independent relevance under the rules of war. *See generally* Baxter, *supra* note 12. Apart from the two classifications of wartime spies, municipal law customarily treats conduct consisting of passing military information to the enemy under a variety of different labels:

a) espionage under local civil statutes;
b) espionage under the rules of the army;
c) collaboration with the enemy;
d) war-treason, *i.e.* passing legally acquired information to the enemy; and,
e) treason.

The above list is not intended to be complete, but it is representative.

20. M. McDOUGAL & F. FELICIANO, *supra* note 2, at 559; *cf. Ex parte* Quirin, 317 U.S. 1 (1942).

21. W. HALL, *supra* note 2, at 535; H. HALLECK, *supra* note 1, at 407; Koessler, *supra* note 19, at 26.

trial must be a normal judicial proceeding.[22] Resort to special military commissions rather that courts-martial is not infrequent and, in fact, may be the rule.[23] In any event, no indictment is necessary[24] and trial proceedings are summary in nature.[25] The execution of an alleged spy without trial, however, subjects the captor to liability as a war criminal.[26]

Three defenses are available to a charge of belligerent espionage under the law of war. First, an accused may plead as a matter of fact that he was not collecting or seeking to collect information for use by another state. Secondly, since deception is still the essence of wartime espionage, proof that a military soldier was in uniform or identifiable as an enemy is a complete defense and requires that the captor treat the captive as a POW.[27] Finally, the law of war requires that the belligerent spy be caught in an act of espionage as a condition to his

22. Some authorities contend that a judicial determination of the fact of espionage is required. *E.g.,* M. MCDOUGAL & F. FELICIANO, *supra* note 2, at 560. Other authorities argue that an administrative determination satisfies the requirement. *E.g.,* McKinney, *supra* note 16, at 602-03.

23. Military commissions had their origin in boards of officers composed to hear cases involving violations of the common law of war over which a general court-martial might or might not have jurisdiction. Halleck, *Military Espionage;* 5 AM. J. INT'L L. 590, 597 n.* (1911) (reference is made to the footnote authored by the editor, G. Davis). Major André, for example, was tried before a military commission authorized by Washington notwithstanding court-martial jurisdiction over spies. Morgan, *Court-Martial Jurisdiction over Non-Military Persons Under the Articles of War,* 4 MINN. L. REV. 79, 107 n.101 (1919). President Roosevelt also empaneled a military commission to hear the saboteur cases in 1942 although court-martial jurisdiction existed. *See Ex parte* Quirin, 317 U.S. 1, 31 & n.9-10 (1942). *See generally* Cohen, *Espionage and Immunity—Some Recent Problems and Developments,* 25 BRIT. Y.B. INT'L L. 404, 405 (1948).

24. McKinney, *supra* note 16, at 596.

25. Koessler, *supra* note 19, at 25; McKinney, *supra* note 16, at 596. One writer has said of German practice during World War II that little more than prima facie proof was required for even a capital decision. Cohen, *supra* note 23, at 405. *See also* note 105 *infra* and accompanying text.

26. Trial of Rohde, 5 War Crimes Reports 54 (1946); Trial of Sandrock, 1 War Crimes Reports 35 (1945).

27. W. HALL, *supra* note 2, at 535. Most of the classic authorities were careful to distinguish espionage from scouting and dispatch-bearing. The scout and the spy perform similar functions within the zone of military operations and are distinguishable only by the disguise practiced by the latter. H. HALLECK, *supra* note 1, at 406-07; 2 L. OPPENMEIM, *supra* note 1, at 197; Halleck, *supra* note 23, at 598 (discussion relative to the case of Major André).

loss of POW status.[28] Article 31 of the Hague Regulations reflects this exception and provides that a belligerent spy captured after rejoining his army must be treated as a POW.

A captured non-belligerent spy is likewise denied POW status. If a civilian agent is captured within the theater of war, the same rules are applied as in the case of a belligerent spy except that the only defense permitted is one on the factual merits.[29] The civilian spy obtains no immunity from identification or by rejoining his forces. This result is justified, according to some authorities, because a military spy must return to his unit within a rather limited time. A civilian, with no duty to report, is a greater danger to the belligerent army and compels the use of a more stringent deterrent.[30]

A non-belligerent spy operating within the interior of an opposing state is not punishable under the law of war.[31] His activity constitutes a violation of municipal law which is not recognized under international law.[32] An enemy agent captured in the interior has committed a true crime and must be prosecuted under the applicable local law. In the United States, for example, he may be punished only after indictment, jury trial and, if appropriate, appellate review.[33] It should be observed, however, that *Ex parte Quirin*[34] casts doubt on the continuing validity of this rule. In *Quirin*, German soldiers were captured in Chicago and New York while out of uniform and engaged in sabotage and espionage. The place of capture was not considered in determining the prisoners' status, although the law of war was chosen

28. This result has been justified on two grounds. First, proving the facts after the spy has rejoined his army is often very difficult. Secondly, since spying is a "ruse of war," which the imposition of a severe penalty is designed to deter, once the act is complete the need for deterrence has passed. *See* Baxter, *supra* note 12, at 331.

29. McKinney, *supra* note 16, at 601. Professor Baxter argues that article 31 of the Hague Regulations applies to civilian as well as to military spies. That is to say that any spy caught after rejoining his forces is immune from prosecution. Baxter, *supra* note 12, at 331-32.

30. McKinney, *supra* note 16, at 602. Professor McKinney also argues that since a civilian spy has no army to rejoin, article 31 can have no application. *Id.*

31. The classic rationale for this rule is that spying outside the zone of operations does not pose an immediate threat to military operations. McKinney, *supra* note 16, at 606.

32. Baxter, *supra* note 12, at 332; McKinney, *supra* note 16, at 605-06.

33. *E.g.*, United States v. Molzahn, 135 F.2d 92 (2d Cir.), *cert. denied,* 319 U.S. 774 (1943).

34. 317 U.S. 1 (1942).

as the applicable law. While the belligerent characterization is supported by the fact that the soldiers were on a sabotage mission, the Court's loose application of belligerency status to the espionage charge has been heavily criticized.[35]

For the most part, the law of espionage in time of war has been codified in the Hague Regulations of 1899 and 1907.[36] Articles 29 and 30 define the belligerent spy and provide for trial upon capture. Article 31 establishes immunity upon an agent's successful rejoining of his forces. Article 24 provides that ruses of war are permissible and, by implication, covers espionage. The Hague Regulations are important to this study for two reasons. First, they serve to crystallize the law of espionage in its outmoded form. The Regulations retain both the agency and secrecy definitional bases and, by so doing, they fail to satisfy the needs of security even in light of the technology available at the time of their adoption. For example, the 1899 Regulations exempted ballonists from the definition of spy.[37] Intent to disseminate information to the enemy is absent from many serious threats to military security. The Regulations leave to the ingenuity of active belligerents the task of protecting themselves against unauthorized disclosures by persons or instrumentalities over which they have minimal or no control. Consequently, the Regulations do not provide an effective framework within which belligerents may achieve even minimal security, nor do they provide effective checks and balances against excesses in the name of military necessity. Secondly, the Regulations preserve a theoretical inconsistency. On the one hand, a belligerent state is not liable for the employment of spies; on the other, the agent is subjected to severe penalties for engaging in a lawful activity of his principal. It is clear that a belligerent spy is not being "punished" in the sense that a criminal is punished for violation of a municipal code.[38] Harshness is, nevertheless, characteristic of the sanctions employed. The severity of the treatment has been justified on a number of grounds, all of which ultimately rest on the danger posed by the spy. Loss of POW status or execution has been justified as being a deterrent,[39] a rule of combat, an act of self-defense or

35. *E.g.,* Baxter, *supra* note 12, at 331 & n.3.

36. *See generally* Baxter, *supra* note 12, at 329-32.

37. HAGUE CONVENTION OF 1899, art. 29.

38. Baxter, *supra* note 12, at 332; McKinney, *supra* note 16, at 600; *see* 3 C. HYDE, *supra* note 2, at 1864-65.

39. "Spies are punished, not as violators of the laws of war, but to render that method of obtaining information as dangerous, difficult, and ineffective as

simply a penalty for being caught.[40] In rebuttal, critics have pointed to the inconsistent immunity provision that rewards the successful spy and dilutes the deterrent effect of the rule, to the travesty of justice in meting out punishment for lawful conduct, and to the inconsistency of the rule that distinguishes between legitimate and illegitimate acts of war and not between more or less dangerous forms of belligerency.[41]

Professor Baxter has, in a sense, harmonized these inconsistencies.[42] In his view the law of war establishes three, not two, classifications of belligerent conduct: conduct that is illegitimate and for which offenders are punished; conduct that is legitimate and for which belligerents are protected upon capture as POW's; and conduct that is legitimate but for which the law of war affords no or little protection. At first glance, Professor Baxter's view seems to define away the contradictions without really solving the underlying disjuncture.[43] Certainly, the spy to be shot at dawn receives little comfort from the knowledge that he has acted lawfully but that the rules of war were not designed to protect his legitimate conduct. Professor Baxter's view, however, does provide a means of escape from the legal-illegal dichotomy. At present, the rhetoric of legality obfuscates rational solution of how to provide belligerents with meaningful tools to secure sensitive information. "Legal" conduct on the part of a potential security violator is taken to mean that the law of war does not permit internationally recognized countermeasures. The belligerent is left to his own devices, which may be cruel, ineffective or both, and, ipso facto, "illegal."

For example, a belligerent cannot permit its security to be breached by a foreign newsman, yet only three solutions are now available.[44] The belligerent could brand the newsman as a spy under international law and treat him accordingly. Such a course of action would result in serious international repercussions because the

possible." DEP'T OF THE ARMY, THE LAW OF LAND WARFARE, para. 77 (FM 27-10, July 1956). *See also* M. MCDOUGAL & F. FELICIANO, *supra* note 2, at 559.

40. McKinney, *supra* note 16, at 600.

41. Koessler, *supra* note 19, at 29-30.

42. *See generally* Baxter, *supra* note 12, at 332-33.

43. *See* M. MCDOUGAL & F. FELICIANO, *supra* note 2, at 554-55.

44. The German Government during the Nazi era used each of the three methods discussed, together with informal pressure, as a method of controlling the content and flow of information from foreign newsmen to their home offices. E. BRAMSTED, GOEBBELS AND NATIONAL SOCIALIST PROPAGANDA 1925-1945, at 122 (1965).

newsman is not a "secret agent."[45] Indeed, members of the belligerent government might well run the risk of being personally liable as war criminals.[46] The second alternative open to the belligerent would be to try the correspondent as a violator of municipal or military law. This may be the most attractive solution, since prosecution and punishment for violation of local law serve both as a deterrent and as a "legal" justification for the countermeasure. This solution is not entirely satisfactory, however, since the trial and punishment of a neutral non-belligerent may still give rise to prosecution of the state officials as war criminals, even when municipal law has been scrupulously followed. Moreover, since the dissemination of "news" is not necessarily accompanied by the specific intent to aid the enemy, a conviction under municipal espionage statutes may not be possible. Prosecution under a less severe municipal law may not be satisfactory, since conviction on a minor charge will not serve as an effective deterrent to breaches of national security. Even though local security needs are met, international repercussions may result from the punishment of a correspondent whose conduct was at most merely negligent.[47] The third option, expulsion, while curing international difficulties, leaves the needs of national security largely unsatisfied. Expulsion from the country will not serve as a deterrent to future abuse. Moreover, the belligerent may risk even greater harm by releasing an individual with information not yet stale. The real problem with the newsman who stumbles across sensitive information is not whether he is acting legally or even whether the belligerent may legally take action against him. Rather, it is how to minimize the danger to the belligerent and at the same time minimize the inconvenience to the journalist. The law of war provides no guidance in this very simple situation.

The utility of Professor Baxter's view in providing an escape from the fixation on legality is that the classification system established by the law of war is based on the degree of privilege associated with particular conduct. A captured infantryman is privileged by classification as a POW. A captured spy, excluding the belligerent who has successfully rejoined his forces, is not entitled to the POW classification. However, the spy is not without any privilege: he must be tried

45. *E.g.*, the British protested the German action against the English ballonist in 1870. 7 J. MOORE, *supra* note 7, at 233-34.

46. *See* cases cited *supra* note 26.

47. *E.g.*, both the British and United States Governments reserved their rights to freedom of the seas as neutrals in the Russo-Japanese War. 7 J. MOORE, *supra* note 7, at 233-34.

before sentence is executed. Once it is recognized that the degree of privilege associated with any particular breach of security can be tailored to the needs of states at war without jeopardizing other legal classifications, the way is opened to work out the solution to any security problem in realistic terms. Moreover, the existing deficiencies in definition, as well as the inconsistencies within the rules, may be clarified without any damage to national security. At present, the rules of espionage, under the law of war in general and the Hague Regulations in particular, are virtually useless either as tools to secure state secrets or as a means to preserve minimal human rights where sensitive information is involved. What is urged does not compel a framework of rules emphasizing either state security or humane treatment for those who have breached security, but a flexible structure of classifications adopted after rational consideration of the needs of the international system.

B. *The Law of Peace*

While espionage has a time-honored place in the law of war, the same cannot be said for the law of peace. The authorities differ over whether espionage is even recognized under international law and lines are sharply drawn over whether espionage is a delict.[48] As a practical matter, the question has arisen rarely in the past. A government had only to deny officially any connection with a captured agent in order to avoid international consequences, even if legal recourse were available to the aggrieved nation. So far as the spy was concerned, with no state willing to defend him, he was a violator of municipal law and was tried and punished accordingly.[49] Consequently, the practice has developed to treat espionage in time of peace as a problem of municipal law. Until quite recently, international law only defined a spy[50] and probably recognized that a state that directed an espionage

48. *See generally* ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW (R. Stanger ed. 1962). In recent years, Professor Stone has been the leading defender of espionage as conduct not violative of the law of peace. J. STONE, LEGAL CONTROL OF INTERNATIONAL CONFLICT 563 (1954). However, the weight of authority supports the position that espionage is an unfriendly act incompatible with the underlying premise of international law of peace that nations respect the territorial integrity of sister states. *E.g.*, Baxter, *supra* note 12, at 329.

49. 1 L. OPPENHEIM, *supra* note 1, at 862.

50. Note 1, *supra*, and accompanying text.

campaign against another nation had committed an unfriendly act. [51] Customary international rules governing the conduct of states in the aftermath of the discovery of espionage are few. Beyond the observation that espionage does not justify a military attack, international law offers little guidance. Protest and denial seem to remain the most accepted ritual. [52] Espionage and related activities by accredited diplomats or members of their staff is also the subject of an occasional exchange of notes between governments. [53] Since an accredited diplomat cannot be prosecuted under municipal law, the normal practice is to declare the individual *persona non grata* and demand recall. [54] Regardless of the circumstances surrounding the espionage, however, no particular response is compelled. Canada took the unusual step of withdrawing the head of its mission to the U.S.S.R. in the aftermath of the defection of a cipher clerk who uncovered a "spy ring" directed by Soviet embassy personnel. [55] Yet the United States only protested the "bugging" of its Moscow embassy building. [56] While diplomatic practice demonstrates that consequences in fact flow from the discovery of espionage, a good deal of uncertainty remains. The law of peace seems to be settled in only one situation: a secret agent captured within the interior of another state, under circumstances uncomplicated by a separate

51. *See generally* Wright, *Espionage and the Doctrine of Non-Intervention in Internal Affairs* in ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW 3 (R. Stanger ed. 1962).

52. 1 L. OPPENHEIM, *supra* note 1, at 511. Variations on the same theme are also popular. For example, the initial United States response to the Soviet announcement following the downing of the U-2 was to deny espionage and to claim that a weather plane may have strayed across the border. The Soviets also have complained of numerous border violations by American military aircraft in Eastern Europe. The popular American response is that the pilot lost his bearings. For a review of United States efforts to secure international adjudication of the more serious aerial incidents before the International Court of Justice see Jessup, *The Development of a United States Approach Toward the International Court of Justice*, 5 VAND. J. TRANSNAT'L L. 1, 6-11 (1971). In the case of territorial waters or airspace violation, an apology is also customary. *E.g.*, N.Y. Times, Dec. 15, 1960, at 18, col. 6 (Soviet apology to Finland for unintentional violation of airspace).

53. *See generally* Cohen, *supra* note 23.

54. *E.g.*, within the past year Great Britain has expelled a large number of Soviet embassy and consular officials for alleged espionage. N.Y. Times, Sept. 25, 1971, at 2, col. 8. *See also* Cohen, *supra* note 23, at 28.

55. The Canadian incident is explored in depth in Cohen, *supra* note 23.

56. N.Y. Times, May 20, 1964, at 1, col. 2.

violation of international law, gives rise to an exchange of notes, a protest and a denial.

International repercussions following recent espionage incidents indicate that the law of peace is in a developmental phase. The classic tradition of refusing to acknowledge espionage activity is no longer available in many situations. In an effort to alleviate the difficulty posed by this problem, states have made an almost conscious effort to avoid a solution in terms of espionage law. The felt necessity to spy on sister states and the equally felt necessity to screen this activity from public view as much as possible have led nations to characterize the problem in terms of other areas of international law. In particular, the law of the sea, air law, and the nascent space law have been called upon to solve problems only tangentially relevant to those disciplines. [57] For example, whether a trawler equipped to intercept radio transmissions and proceeding at very low speed is entitled to innocent passage is not really a question properly asked under the law of the sea. [58] States nevertheless succeed in shunning the espionage label by pursuing a solution nominally within the law of the sea. [59] In this fashion, states may avoid the direct discussion of espionage, which may constitute a delict. [60] The spying state is compelled to justify the innocence of its passage and the aggrieved state minimizes the risk that it will be estopped from raising the issue by its own espionage that is conducted in a different manner. This is not to say that the law of the sea or other disciplines have no relevance in a particular case. In many situations, the best solution may continue to be provided by the rules of a related area of law. Since the law of espionage is undeveloped,

57. *See, e.g.*, Lissitzyn, *Some Legal Implications of the U-2 and RB-47 Incidents*, 56 AM. J. INT'L L. 135 (1962); Rubin, *Some Legal Implications of the Pueblo Incident*, 18 INT'L & COMP. L.Q. 961 (1969).

58. *Cf.* Rubin, *supra* note 57, at 968.

59. *E.g.*, the *Pueblo* incident was treated by the states involved as a maritime problem. *See generally* Rubin, *supra* note 57. Similarly, the U.N. deliberations following the U-2 incident were couched in terms of territorial sovereignty over airspace. *See* Wright, *supra* note 9.

60. States are noticeably reluctant to allege a delict on the basis of espionage activity. For example, although Canada withdrew the head of its mission to the Soviet Union in 1948, the Canadian Government did not charge the U.S.S.R. with a delict. *See* Cohen, *supra* note 23, at 408. Likewise, Russia did not charge the United States with a delict involving espionage in the wake of the U-2 incident. The Soviets, however, did allege a delict for violation of its airspace. *See generally* Wright, *supra* note 9. The North Koreans officially did not allege misconduct involving espionage by the *U.S.S. Pueblo* but justified its actions on the basis of a territorial waters intrusion. *See generally* Rubin, *supra* note 57.

however, and the little that exists is tied to an archaic theoretical foundation, the search for the best response to meet the needs of the international community is hampered by avoiding the issue.

Within the past 25 years, several major incidents have occurred that illuminate the theoretical deficiencies inherent in the traditional approach.[61] In each instance, the international community was compelled to react to espionage as a state activity. In itself, this is a major advance and may have interred the agency doctrine in a well-deserved grave. Since many nations officially have been recognized as spies in their own right, the first step has been made in reaching a rational accommodation between the conflicting goals of obtaining and protecting sensitive information. Moreover, in the United Nations deliberations following the downing of the U-2, the United States not only admitted its espionage but also defended its conduct on the basis of the past Soviet practice of employing secret agents and asserted that the United States had a duty toward the "free world" to spy on the U.S.S.R.[62] Significantly, the Russians did not challenge this defense directly. Instead, they attacked the American position collaterally. The Soviets distinguished traditional espionage from an overflight and defended their response as an act of self-defense against United States aggression on the grounds that even a single plane was capable of carrying weapons of great destructiveness.[63] Thus, the United States took a firm position that states not only spy but also have a responsibility to spy in time of peace, and the Soviet Union did not contest the issue.

While official reaction to a known practice on one occasion may not be significant, such recognition acquires relevance in the light of other developments. The extreme Canadian response noted above and the negotiations surrounding the capture of the *U.S.S. Pueblo* suggest that the law of peace now recognizes espionage as state conduct that, in some circumstances, gives rise to international responsibilities. Official response to state espionage does not mean that nations now have a recognized right to spy. Nonetheless, the attempt to resolve questions of espionage within the specific context of the law of the sea and other related disciplines, together with state practices exemplified by the aftermath of the U-2 incident, lends support to the argument that nations are reacting to espionage activity on the basis of permissible response to given types of spying rather than on the basis of the legality or illegality of espionage per se. In the U-2

61. The incidents of major importance have been the Canadian discovery, the U-2, the capture of the *U.S.S. Pueblo,* and the spy exchanges.

62. *See* Wright, *supra* note 9, at 836-44.

63. *See* Wright, *supra* note 9, at 840.

deliberations, no party seriously questioned the right to destroy an intruding aircraft or to try a captured agent under municipal law. The essence of the United States position was that espionage is state conduct demanded by the needs of Western security and that overflight by an unarmed reconnaissance aircraft was not an act of aggression. The Soviet response was not in terms of the legality of espionage, but rather that aerial espionage was especially dangerous to world order since armed and unarmed aircraft were indistinguishable on radar. With the announcement by President Kennedy that such flights would not be resumed,[64] the United States apparently conceded the issue. Moreover, the orbiting of reconnaissance satellites by both nations provides an effective substitute that serves national security needs and, for the present time at least, is consonant with world order.[65] The U-2 incident and its aftermath, then, illustrate that international law may be restructuring the rules relating to espionage on the degree of toleration and the type of permissible response to particular conduct.

The international law of extradition as now practiced further supports this conclusion. Like treason and sedition, espionage has generally been considered a "political offense" and non-extraditable.[66] Since World War II and the onset of the "Cold War," however, this customary rule of international law has been strained severely. Extradition and deportation are used increasingly as executive tools to further the needs of bloc security policy concerning sensitive information. An illustrative example is provided by the Soblen case. Jack Soblen was a Soviet agent who conspired to penetrate the United States Office of Strategic Services and obtain secret information. He was convicted under the United States espionage laws and sentenced to prison,[67] but escaped to Israel. The Israeli Government ordered that he be deported to the United States for illegal entry and released him to the custody of American officials. En route to New York, he managed to slash his wrists, thereby necessitating hospitalization in London where he requested political asylum. After repeated "representations" by the United States Government urging that Soblen be deported, his request was denied. When the Home Secretary ordered

64. N.Y. Times, Jan. 26, 1961, at 1, col. 8.

65. *Cf.* Falk, *Space Espionage and World Order: A Consideration of the Samos-Midas Program* in ESSAYS ON ESPIONAGE AND INTERNATIONAL LAW 45 (R. Stanger ed. 1962).

66. *See generally* Garcia-Mora, *supra* note 15.

67. United States v. Soblen, 301 F.2d 236 (2d Cir.), *cert. denied,* 370 U.S. 944 (1962).

deportation, the English courts refused to review the order despite precedents that would have permitted the courts to deny deportation on the grounds that it was a subterfuge to avoid the "political offense" exception to extradition. [68]

Western nations generally refuse extradition to Communist bloc countries, although extradition or deportation is more likely when the request originates from another Western state. Similar practices are implemented by treaty provision among Warsaw Pact countries. [69] The changing needs of international security have altered the practice, if not in fact changed the international law, of extradition of espionage agents. The emerging pattern is not based on the classic rationale for denying extradition in the case of political offenders. Extradition no longer is denied simply because the individual has committed an act directed against the security of another state. Instead, the need to safeguard the security of a group of nations justifies the abandonment of the political offense exception as a defense against extradition or compels the use of the defense against the demand for extradition from a non-bloc state. The privileged status created by international law is not itself attacked as unjustified or illegal. A new and different set of criteria related to interstate security needs, however, now govern the application of the political offense exception. The current practice concerning extradition and deportation of spies is an affirmation of interstate responsibility for the protection of mutual confidences. The executive practice of trading spies within the camp, while restricting their flow across the ideological barrier, serves the needs of the current world situation by insuring that hostile agents with sensitive information do not escape detention within the bloc.

The development of new international law concerning espionage practices has been extended to the treatment accorded captured agents. The growing official acceptance of espionage as a state activity has opened the door for nations to assume some responsibility toward their agents that have been captured abroad. Within the past several years, a few encouraging examples of the exchange of spies between the East and the West have taken place. [70] As long as states were able to deny effectively their conduct of espionage such exchanges were unlikely. The containment policy underlying current

68. Rex v. Governor of Brixton Prison, *ex parte* Sarno, [1916] 2 K.B. 742. In a pathetic finale, Soblen committed suicide while still in England.

69. *See generally* KIRCHHEIMER, POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURES FOR POLITICAL ENDS 365-69 & n.30 (1961).

70. The most widely publicized exchange was the 1962 Abel-Powers-Pryor trade.

extradition practices may have contributed also to the initiation of spy exchanges. The bloc practice of containing hostile agents has buttressed municipal espionage legislation and, in a sense, has given local law an extraterritorial significance. The result is that international obligations based on joint security needs supplement functions performed previously by local law alone. For example, the deterrent effect of municipal law is enhanced by the extradition practices of bloc states. The increased efficacy of municipal legislation may have been another element that created an atmosphere favorable to the exchange of captured spies. When the information obtained by a spy has become stale, his further detention serves the needs of national security principally as a deterrent. [71] If deterrence is satisfied otherwise, the agent's exchange for another similarly situated may be easier to justify.

Executive action has been the significant moving force in the development of international practice regarding espionage. This practice represents a clear departure from the pre-existing law of peace. Some state activity has been abandoned because the interests in obtaining information do not outweigh the increased danger to national security and to minimum world order arising out of the specific conduct. Nonetheless, states have assumed a kind of mutual responsibility toward the protection of information that is important to bloc security. Such conduct cannot be explained in terms of an espionage law that is based on principal-agent relationships and that only gives effect to the national interest in protecting secrets against clandestine theft. In contrast to the law of peace, municipal statutes enacted in the first quarter of this century have provided a framework within which states have been able to give full play to the demands of national security. With such a background, executive response to the problems of international espionage has been couched largely in terms of the model that reflected the needs of state security rather than in

71. At the conclusion of Rudolf Abel's trial for conspiracy to commit espionage, the Government urged "a substantial and very strong sentence" to "serve notice upon the men in the Soviet Union . . . that the commission of espionage in the United States is a hazardous undertaking." J. DONOVAN, STRANGERS ON A BRIDGE 254-55 (1964) (quoting W.F. Tompkins, Assistant Attorney General and chief prosecuting attorney). In commenting on the sentence about to be imposed, Judge Byers noted, *inter alia*, "Thus the problem will be seen to present the single question of how the defendant should be dealt with so that the interests of the United States in the present, and in the foreseeable future, are to be best served, so far as those interests can be reasonably forecast." *Id.* at 256.

terms of the international model that was not only outdated but also incomplete. To the extent that current interstate practice represents a development of the law of peace, municipal law has provided an important source for the evolution.

III. Municipal Law and Executive Power

Before the turn of the present century, municipal legislation relating to espionage was founded on three concepts. The spy was an agent of another state who practiced his trade in secrecy and whose conduct was intentional in nature. The essence of the crime was said to be clandestine activity and statutes were drafted in such language.[72] Moreover, the agency and scienter requirements were quite narrow. Municipal law generally required that a spy be an agent of a foreign power[73] and limited the requisite intent to passing information injurious to the state.[74] Indeed, it is still popular to claim that the agency and scienter requirements are distinct and that espionage is distinguishable from treason and sedition on the basis of the agency relationship.[75]

Beginning with the American Civil War, however, the inadequacies of this municipal foundation became apparent. Telegraphic and wireless communication, aerial flight and the impact of guerrilla warfare outlined the inherent weakness of the existing espionage laws as tools to enforce the needs of national security.[76] By World War I, the old espionage laws were clearly antiquated and modern rules were needed. In the United States, the reform occurred in 1917; in Europe, it occurred somewhat earlier. Most of the nations of the world had enacted new legislation well before the start of World War II.[77]

72. Espionage legislation prior to 1900 was treated within the framework of military law. For a survey of early statutes and legislative history see Morgan, *supra* note 23, at 107-11. The first American legislation was enacted in 1776 and the language, "lurking as spies," has persisted to the present day. Uniform Code of Military Justice, art. 106.

73. Garcia-Mora, *supra* note 15, at 81-83.

74. *See* McKinney, *supra* note 16, at 592-93.

75. Garcia-Mora, *supra* note 15, at 79.

76. *See* Morgan, *supra* note 23, at 109-10.

77. Garcia-Mora, *supra* note 15, at 81-83. In the United States and England the reform came in the form of separate civil statutes. The American statute is a clear departure from pre-existing law in both language and coverage; court-martial and military commission jurisdiction is retained, however.

The principal change was an elimination of the agency requirement. Whether municipal law has ever required proof of agency per se is unclear. However, the specific intent to communicate information to another state was required, and this led to the not unreasonable assumption that some type of formal relationship existed between the two parties. Nevertheless, the purpose of municipal law has always been to protect against the disclosure of classified information regardless of agency.[78] The modern statutes perform this function by differentiating between collection and dissemination, not by incorporating the two. In this way the statutes make very clear that agency is not an element of espionage. The prohibited activity is collection or dissemination of sensitive information.[79] The United States statutes emphasize this point by providing that "reason to believe," as well as specific intent, is sufficient to establish liability.[80] Such a provision is unnecessary if an agency relationship is at the root of the prohibition. Even more telling is the statutory provision relating to foreign agents. Quite apart from the espionage laws, United States statutes provide that foreign agents must register with the Secretary of State and not infrequently spies are prosecuted for a violation of both statutes. In one case the espionage conviction was reversed without disturbing the conviction under the registration statute;[81] while in another, the court was clearly bothered by the paucity of evidence establishing either intent or agency and resorted to the technical rules of conspiracy to affirm a conviction.[82]

Reference to clandestine activity is absent from modern legislation. The entire thrust of the statutes is aimed at control of the flow of information relating to the national defense, however collected or transmitted. Judge Learned Hand specifically rejected the government's contention that deceptive means of acquiring information was relevant in an espionage prosecution.[83] The test, he said, was whether the information could be gathered at all, not how it was gathered.[84]

---

78. *See, e.g.,* 7 J. MOORE, *supra* note 7, at 231-34 (a collection of espionage statutes principally of the United States).

79. *E.g.,* 18 U.S.C. §§ 793-94 (1970). *See also* Boeckenhaupt v. United States, 392 F.2d 24 (2d Cir.), *cert. denied,* 393 U.S. 896 (1968).

80. *E.g.,* 18 U.S.C. §§ 793-94 (1970). The language "directly or indirectly" also militates against the requirement of agency.

81. United States v. Heine, 151 F.2d 813 (2d Cir. 1945), *cert. denied,* 328 U.S. 833 (1946).

82. United States v. Molzahn, 135 F.2d 92 (2d Cir.), *cert. denied,* 319 U.S. 774 (1943).

83. United States v. Heine, 151 F.2d 813 (2d Cir. 1945), *cert. denied,* 328 U.S. 833 (1946).

84. 151 F.2d at 816.

The intentional character of espionage activity is the major delimiting element of the modern statutes. Specific intent is, of course, covered.[85] Mere reason to believe that information is to be used to the injury of the country or for the benefit of another state is also sufficient.[86] The motive for commiting espionage is irrelevant.[87] Perhaps the most significant modern provision is that the information need not be injurious to the state from whom it is stolen. A crime is committed even if the foreign government to be benefited is an ally.[88] Thus, intent to deliver information relating to United States national security with a view toward benefiting the Soviet Union in its relations with Japan is covered under the act.[89] Moreover, a spy need not intend to aid a nation. Assistance given to "any faction or party or military or naval force within a foreign country" or any representative thereof will fulfill the statutory requirement.[90] Since the majority of states also incorporate conspiracy provisions, the scienter requirement is much enlarged.[91] Consequently, overt acts in furtherance of a conspiracy may result in liability for the commission of otherwise lawful activity.[92]

Executive prerogatives and responsibilities under the new statutes are important. Equally important is the executive's power to use both international law and municipal law as tools to protect information relating to the national defense.[93] The single most important responsibility of the American executive is to take the first step to protect sensitive defense information.[94] Without such a step, the

85. United States v. Rosenberg, 195 F.2d 583 (2d Cir.), *cert. denied,* 344 U.S. 889 (1952). *See also* Grzybowski, *The Powers Trial and the 1958 Reform of Soviet Criminal Law,* 9 AM. J. COMP. L. 425, 432-33 (1960) (discussing intent under the Soviet espionage statutes).

86. Gorin v. United States, 312 U.S. 19 (1941).

87. 312 U.S. 19 (1941).

88. "[U]nhappily the status of a foreign government may change." 312 U.S. at 30.

89. 312 U.S. at 30.

90. 18 U.S.C. § 794 (a) (1970).

91. *E.g.,* 18 U.S.C. § 794 (c) (1970); *see* Cross, *Official Secrets,* 6 THE LAWYER 31 (Trinity 1963) (criticizing British practice of trying spies under the conspiracy provision of the Official Secrets Act of 1911).

92. United States v. Lang, 73 F. Supp. 561 (E.D.N.Y. 1947).

93. In some situations the executive may elect to prosecute a spy either under civil law before a court of general jurisdiction or under military law before a court-martial or a military commission.

94. No attempt is made to discuss the executive classification of sensitive information or to examine the degree of protection that is, for example, afforded "Restricted" as opposed to "Top Secret" information. Indeed, one of the better

information is public and may be collected or disseminated without control.[95] Moreover, in the United States, at least, only information relating to the national defense is protected by the espionage laws.[96] The question whether a particular piece of information is related to the national defense is a question of fact, and therefore the public prosecutor has the power to bring suit regardless of the subject matter. In this regard, the Supreme Court has specifically held that agricultural statistics might properly be covered by the espionage law.[97] Initially, the burden is on the government to protect the information that it deems sensitive.[98] In the absence of such protection, information specifically released to the public or information that "the services have never thought it necessary to withhold" may be transmitted to a foreign nation without subjecting the sender to prosecution.[99] The laws and traditions of the United States and most Western nations do not distinguish between information publicly available within the nation but nontransferable to foreigners. Consequently, the burden on the government to secure its intelligence assumes extensive proportions. The Soviet Union and many Eastern bloc countries do make this distinction, and while the espionage statutes do not speak in such terms, additional protection is afforded the state. Moreover, even in the United States certain kinds of information may be protected independently of the espionage laws. Particularly in the case of atomic energy, alternative modes of statutory protection are available.[100] Thus, in some instances the executive may be able to choose between alternative means of prosecution as a method of enforcing state secrecy.

---

features of modern statutes, which has been carried over from the older models, is that no distinction is drawn between degrees of sensitivity. While such classifications may be necessary within the government or military, administration of a sytem of sanctions based on such a classification scheme would be unduly burdensome. *But see* United States v. Rosenberg, 346 U.S. 273 (1953).

95. United States v. Heine, 151 F.2d 813 (2d Cir. 1945), *cert. denied,* 328 U.S. 833 (1946).

96. The British Official Secrets Act of 1911 protects all government documents and confidences. *See* Cross, *supra* note 91.

97. Gorin v. United States, 312 U.S. 19 (1941).

98. United States statutes also require that certain geographic areas must be designated by the President if the area is to fall within the protection of the act. *E.g.,* 18 U.S.C. § 793(a) (1970).

99. United States v. Heine, 151 F.2d 813, 815-16 (2d Cir. 1945), *cert. denied,* 328 U.S. 833 (1946).

100. *See, e.g.,* Rosenberg v. United States, 346 U.S. 273 (1953).

The Rosenberg case offers an example of just such a choice. The Rosenbergs were tried for conspiracy to violate the espionage laws. The prosecution sought the death penalty on the basis of wartime activity occurring in 1944. Yet the conspiracy, as alleged and proved, extended through 1950. In 1946 the Atomic Energy Act, which provided for death only on the recommendation of the jury, was passed.[101] By opting for prosecution under the espionage law, the government successfully avoided putting the question of death to the jury. Over vigorous dissents by Justices Black, Douglas and Frankfurter, the Supreme Court upheld the government's prerogative to elect its remedy.[102]

Ex parte Quirin[103] offers a similar example, differing only in the fact that the choice was between municipal and international law. Eight German soldiers were put ashore by submarine in the early days of World War II to conduct espionage and sabotage activities in the interior of the United States. Two of these men were United States citizens. The day after they were apprehended by the F.B.I., the President, by proclamation, declared that enemy "subjects, citizens or residents" committing espionage, sabotage or acts in violation of the laws of war would be subject to the jurisdiction of military tribunals.[104] Moreover, the proclamation established procedural rules for the conduct of such military commissions that were at variance with existing procedures set forth in the Articles of War approved by Congress.[105] On a petition for habeas corpus, the Supreme Court unanimously held that the President had acted within his powers and dismissed the petition. As to whether this result is founded on the war powers or simply on the executive power of the President, the Court's opinion is unclear. By one construction, *Quirin* may well establish a precedent that permits the Chief Executive, under his executive power, to bypass Congress in punishing offenders of international

101. 42 U.S.C. § § 1810 (b)(2)-(3) (1970).

102. Rosenberg v. United States, 346 U.S. 273 (1953) (review of stay of execution issued by Justice Douglas). The dissenting justices argued that where two criminal statutes award different penalties for the same conduct, the lesser penalty should be imposed. Justice Frankfurter vigorously objected to the idea that the government should be permitted an election of remedy. "[I]t cannot be left within the discretion of a prosecutor whether the judge may impose the death sentence wholly on his own authority or whether he may do so only upon the recommendation of the jury.... Congress and not the whim of the prosecutor fixes sentences." 346 U.S. at 306.

103. 317 U.S. 1 (1942).

104. Proclamation of the President on 3 July, 1942, 7 Fed. Reg. 5101.

105. *Compare* 7 Fed. Reg. 5103 *with* Articles of War, arts. 38, 43, 46 & 70.

law.[106] In a passage pregnant with implications, the Court noted that Congress had not undertaken to codify international law, mark its precise boundaries or enumerate by statute all acts condemned by international law, but instead had adopted the "system of common law applied by military tribunals."[107] In any event, the espionage laws then in force were not a bar to proceedings before the military commission since Congress had chosen not to limit the jurisdiction of military tribunals.[108] The Court also found that the constitutional guarantees of indictment, jury trial and the like, which had been thought assured in the case of citizens,[109] did not bar a trial before a military commission. The Court held that belligerents, even though citizens, had no constitutional protection against a summary proceeding under the law of war. The Court noted that while some violations of international law did require the government to respect constitutional guarantees, belligerents were not so privileged.[110]

The executive, then, is provided with important options in its legal battle with espionage agents. In addition to the examples above, the government may prosecute spies under the conspiracy laws;[111] it may elect administrative arrest as opposed to criminal process and thereby obtain important advantages during the investigative stage;[112] and, in many cases, it may proceed under the espionage or the treason statutes as it deems fit.[113] Until quite recently, the government was also relieved of an obligation to make certain information available to a defendant. In *United States v. Ebeling*,[114] the government succeeded in keeping secret confidential reports made by a government informer, even though the informer testified during the trial regarding matter contained in the reports. The government argued

106. The President has always had the power as commander-in-chief to appoint a military commission to try offenders against the common law of war even though the offense was covered by an Article of War and triable before a court-martial.

107. 317 U.S. at 29-30.

108. 50 U.S.C. § 38, *as amended*, 18 U.S.C. § 294 (1970).

109. *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1863).

110. 317 U.S. at 37-44.

111. In fact, virtually all espionage prosecutions are for conspiracy. *E.g.*, United States v. Ebeling, 146 F.2d 254 (2d Cir. 1944). *See also* Cross, *supra* note 91 (reporting similar British practices).

112. *E.g.*, Abel v. United States, 362 U.S. 217 (1960) (5-4 decision).

113. *E.g.*, United States v. Molzahn, 135 F.2d 92 (2d Cir.), *cert. denied*, 319 U.S. 774 (1943) (espionage); Haupt v. United States, 330 U.S. 631 (1947) (treason).

114. 146 F.2d 254 (2d Cir. 1944).

that such documents should not be made available to the defense unless the report contained information tending to exculpate or aid the defendant. The trial court privately examined the document and agreed with the government's position favoring its suppression. On appeal, the Second Circuit divided over the issue, with the majority sustaining the trial court.[115] The dissent argued that only the crucible of open trial could properly determine the relevance of such evidence: "The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully. Nor does it seem to us possible to draw any line between documents whose contents bear directly upon criminal transactions, and those which may be only indirectly relevant."[116] The position of the dissent was adopted subsequently by the Supreme Court,[117] although the application of the new rule is yet to be tested in an espionage prosecution. If the current rule continues, the government may find itself on the horns of an uncomfortable dilemma: prosecute and reveal damaging counterespionage information collateral to its case or let the spy go free.

The government's ability to protect sensitive information is qualified in only three respects: first, the government must in some manner identify and guard its secrets; secondly, it must weigh whether the further publication of compromised information is in the national interest before prosecuting at all; and finally, it must weigh the resulting damage to national security in the release of information collateral to that already compromised, but not yet public, against the benefit to be derived from prosecution. The government, however, is provided with modern legislation founded in theory on the threat to security. In addition, its interest in protecting its confidences is aided to some extent by the international community, especially those nations with whom it shares ideology or defense. On a higher plane, even the government's potential enemies apparently restrict their own espionage because of the mutually felt necessity to preserve some minimum world order.

The classic international law of peace treated espionage as a non-event and agents as having committed political crimes that were punishable under municipal law only if the spy were caught and successfully detained within the jurisdiction of the injured state. Executive action, which has been modeled after executive conduct in internal affairs, is now creating a new set of international rules. Incidents involving

115. 146 F.2d 254 (2d Cir. 1944) (2-1 decision, Frank, J., dissenting).
116. 146 F.2d at 259 (Frank, J., dissenting). *But see* Cross, *supra* note 91.
117. Jencks v. United States, 353 U.S. 657 (1957).

espionage are analyzed on the basis of the threat to national security, which undoubtedly has always been the case. Executive responses to such incidents, however, increasingly are framed both in terms of and as a result of the same identification and weighing processes that are used in internal affairs. Nations, through their executives, see reflected in the international sphere the same basic policy conflicts that have long existed internally. Technology permits nations to exploit espionage in more varied ways than sending an agent abroad to steal. Unfortunately, international law has not responded to the changed circumstances despite the efforts of Germany and Russia to force a solution at the end of the last century. Current events, however, indicate that the municipal law solutions and the national practices that have developed over the past half century are providing a theoretical framework within which executive initiative is establishing a new set of rules. Solutions are no longer sought in terms of how to unmask a thief, but rather in terms of how to both exploit for national use and contain for national protection the technology of the industrial and atomic revolutions. The results of this effort not only appear to create entirely original practice and expectation between nations, but also seem to have altered the response to more traditional situations.

Leslie S. Edmondson