Editor's Preface

The untimely death of Dr John Kish in April 1994 resulted in the manuscript of this book being entrusted to me by the University of Kent at Canterbury for completion and editing. The manuscript was largely complete according to the structure laid out by Dr Kish in his Introduction; nevertheless, there were certain areas which were covered in noticeably less detail than others, and in many places a tantalising reference had been left hanging in mid-air, lacking detailed elaboration or cross-references to other situations or materials. Furthermore, events subsequent to Dr Kish's death and developments contemporaneous with my editing required updating of the text. As my mandate from the University of Kent was to do whatever I considered necessary on the manuscript, I concluded that this afforded me considerable leeway and consequently took the liberty of expanding on the original text. Essentially, my own contributions to the book fall into three broad categories, the first two of which are indistinguishable from Dr Kish's original work.

First, without in any way altering the substance of Dr Kish's text, I made significant modifications and corrections to its syntax and grammar. Secondly, in many places I updated the text itself to take into account changes since Dr Kish's death – such as, for example, the entry into force of the United Nations Convention on the Law of the Sea. Thirdly, I pursued my own research to fill gaps and provide extra details and cross-references missing from the manuscript: these I inserted as footnotes separately from the main body of the text.

Espionage might at first appear an unusual subject to write an international law text about. Its most obvious feature to lawyers is the fact that it is almost completely unregulated by international law: with the single exception of the laws of war, there is no rule or body of rules in Public International Law which deal directly with the fundamental question of the legality (or illegality) of espionage. Even the law of diplomacy (a major area of spying activities) touches only very briefly and obliquely on questions of espionage, choosing instead to circle around the problem without ever tackling it directly. Approaches such as this have contributed to the widespread, but only partially correct, perception of espionage as an activity which is virtually by definition

extra-legal. The international community as a whole has bolstered this view in that individual States (of whatever political persuasion) have in the past always sought to deny any systematic involvement in espionage activities in theory, and to conceal them in practice. Traditionally, therefore, international law has always denied the existence of espionage as a legal concept to be regulated by law, treating it instead as an activity that is inherently outside the scope of legal control; only in wartime has espionage been regarded as a practice that is properly subject to legal restraints.

Nevertheless, the fact remains that spying in peacetime is, if anything, even more widespread and central to the foreign policy and international relations of States than it is in time of war. Until the middle of this century, espionage in peacetime was always portrayed as a series of isolated incidents: aberrations in a world where spying was not officially acknowledged. But in the course of the Cold War, espionage rapidly evolved from "isolated incidents" into a systematic and publicly recognised form of State activity essential to the conduct of international relations.

Most States, of course, have long had domestic laws to deal with the punishment of spies; this is normally done either by assimilating their activities to treason (in the case of nationals) or by making espionage *per se* a separate offence (in the case of aliens). This contributed to the perception of espionage as being inherently illegal in international law. However, once States got into the habit of regularly making *ad hoc* bilateral arrangements for the mutual exchange of captured spies, it became clear that governments attach great importance to spies as State agents carrying out activities of enormous significance to States in the conduct of their international affairs; thus the stage was set for the implicit recognition of espionage as a systematic activity that was to be expected in the international relations of the late 20th Century.

The result of these developments has been that international law as it now stands essentially tolerates espionage, while not expressly allowing it except in wartime. The international law rules relating to diplomacy and to territory, for instance, repeatedly refer to the legitimacy, in certain circumstances, of "observation" – a classic euphemism for spying. In light of this, we can conclude that the current international legal status of espionage in peacetime is highly vague and peripheral: references to it in international legal documents are habitually oblique and couched in obscure, often coy, language.

In view of the development of an international system of espionage since the middle of this century, however, it can be submitted that it is now high time for all spying activities to be properly regulated by multilateral agreements: the events of the last fifty years have clearly demonstrated the potential of espionage as an instrument, not of belligerence, but of peace – particularly in the context of the Cold War, extensive and constant mutual spying helped to maintain the balance of power by keeping the two great power blocs informed about each other's military and scientific research activities and relations with client states, thereby acting as an effective deterrent to the kind

of dangerous brinkmanship exemplified by the Cuban missile crisis. In this way, espionage can reveal threats of aggression and accordingly diminish the risk of international armed conflicts, thus helping to preserve international peace and security. Perhaps if this is recognised by the United Nations, the "New World Order" may yet produce an International Espionage Convention; in any event, the potential of espionage as a mechanism for stability should justify its recognition as a crucial aspect of international relations deserving of comprehensive legal regulation, rather than it maintaining a shadowy, ill-defined existence on the fringe of Public International Law.

It remains only for me to express my very deep gratitude and thanks to a number of people whose help has been invaluable to me. I am indebted, first of all, to Judge Rosalyn Higgins of the International Court of Justice, for nominating me to complete Dr Kish's work and securing confirmation of my selection for this assignment; without her recommendation and support I would never have been entrusted with this task in the first place. I am also deeply grateful to Professor Katherine O'Donovan for acting as the intermediary in my contacts with the University of Kent and for her advice, and to the Head of the Kent Law School, for his constant encouragement and help. My thanks, also, to Lindy Melman at Martinus Nijhoff, for her efficiency, patience and willingness to put up with all my queries and delays; and to Roger Vickerman of the University of Kent, for providing information about Dr Kish's involvement in the Channel Tunnel Research Unit which was set up jointly by the University of Kent and the University of Lille.

Finally, I wish to record my profound appreciation of Hanna Kish-Reich, Dr Kish's widow, for her constant interest in my work on her late husband's manuscript, and her unfailing support, encouragement and co-operation. Sadly, I never knew Dr Kish myself, but this book is a fitting tribute to his life's work in international law and it has been a privilege and a pleasure for me to participate in its completion and publication.

David Turns
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