

Introduction

International law and espionage are inherent factors of statehood and originate from the birth of States and their international relations. The general notion of espionage has evolved through a long and profound historical process. Originally, official State policy negated the concept of espionage and attempted to conceal its existence. The intensification of international relations has, however, inevitably intensified espionage activities. Gradually, espionage has developed from isolated incidents to an established international function of States. Governments have publicly admitted the existence of their intelligence services and systematic espionage operations.

In order to protect national security, the detection of spies used to result in the vigorous exercise of criminal jurisdiction. In contrast, the interests attached to these important State agents necessitated certain corrective measures, including the mutual return of spies to their States. Governments started to reach bilateral agreements on the exchange of spies. Such evidence indicates the gradual development of State practice in relation to the implicit recognition of spies as State agents carrying out State functions.

Following the recognition of the permissibility of espionage in customary international law, a corresponding legal policy has emerged in international treaties. In most major areas of international relations, protective rules of national security had to be balanced by permissive rules of intelligence activities. Increasingly elaborate systems of information and observation have been established for the verification of strategic agreements.

The legal regulation of espionage has important consequences for the future of international relations. A balanced legal regime of espionage is intended to safeguard national security, yet facilitate mutual observation. A recognized but regulated system of espionage has the potential of revealing and deterring aggression and consequently diminishing the threat of conflicts and improving international security.

Chapter I examines the distinction between information and espionage. The international law of human rights recognizes the fundamental freedom of information, but also the interests of States in the protection of their nation-

al security. The principle of freedom of information was first formulated in the Universal Declaration of Human Rights. Subsequently, the International Covenant on Civil and Political Rights codified freedom of information in treaty form, subject to restrictions for the protection of national security. The European Convention on Human Rights established a regional regulation balancing freedom of information and national security in a democratic society. Similarly, the American Convention on Human Rights established a comparable regional regime of freedom of information and its limitations. Attempts in the United Nations to codify the particular rules in a separate instrument resulted only in a Draft Convention on Freedom of Information reflecting the policy of States. The special functional regime of the International Telecommunication Convention indicates again the inherent conflict of freedom of information and national security.

Chapter II analyses the relationship between diplomacy and espionage. The international law of diplomatic relations harmonizes the function of observation by the sending State with the duty to respect the law of the receiving State. The diplomatic function of observation may extend to political and strategic developments in the receiving State, but this function shall be exercised by lawful means. The diplomatic freedom of movement facilitates the function of observation, but the receiving State may prohibit entry into particular security zones. The diplomatic freedom of communication is similarly linked to the function of observation, but the receiving State may restrict the transmission of certain telecommunications. The consular function of observation covers cultural and economic conditions in the receiving State, to be ascertained by lawful means. Special missions may carry out observation in accordance with their ad hoc functions. Missions to international organizations may ascertain conditions in the organization, but not in the host State.

Chapter III surveys the coexistence of territory and espionage. International law negates observation in national spaces, but allows it in international spaces. The concept of sovereignty excludes surveillance in national territory, except with the special consent of the territorial State. Despite the right of innocent passage, the sovereignty of the coastal State overrides the interests of the flag State and restricts reconnaissance in the territorial sea. Similarly, the sovereignty of the subjacent State prevails over the interests of the flag State and opposes reconnaissance in national airspace. In contrast, the prohibition of territorial sovereignty and the jurisdiction of the flag State allow strategic observation on the high seas. The international regime of Antarctica also includes the right of surveillance. Again, the prohibition of sovereignty and flag jurisdiction allow strategic observation in outer space.

Chapter IV reviews the interaction of war and espionage. The international law of war allows espionage by belligerent States, but recognizes the criminal jurisdiction of belligerent States over captured spies. As war transcends territorial sovereignty, the rules of war on land permit reconnaissance. Similarly, the rules of war at sea permit tactical observation both in the territorial sea and

on the high seas. Again, belligerent States may carry out tactical observation in war both in national airspace and in international airspace. International humanitarian law prohibits forced, but not voluntary, information from prisoners of war; the same principle governs the prohibition of forced, but not voluntary, information from civilians in war. Finally, the rules of war acknowledge the status of spies and regulate their treatment by belligerent States in armed conflicts.