

INTELLIGENCE GATHERING ACTIVITIES
IN CONTEMPORARY INTERNATIONAL LAW

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BY

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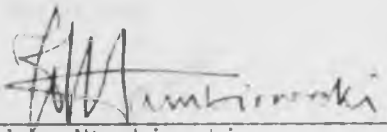
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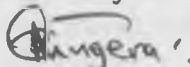
DECLARATION

I, John Ntambirweki, do hereby declare that this Thesis is my original work and has not been submitted and is not currently being submitted for a degree in any other University.

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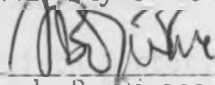
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ABSTRACT

States take decisions in the conduct of their international relations on the basis of intelligence they possess about those States they are dealing with. Not all intelligence required for taking national decisions is always readily available. Nations, therefore, have to deploy intelligence gathering activities to realize the required intelligence. Intelligence gathering activities have, therefore, become an important aspect of international interaction. Between States, individuals and corporations, the intelligence industry has become one of the biggest employers. This thesis is addressed to the problems posed by intelligence gathering activities between States in contemporary International Law.

That contemporary scholarship has not been adequately directed at this area of international interaction, despite its importance, is illustrated in Chapter one.

Chapter Two traces the development of the International Law relating to intelligence gathering from the earliest times to the present day. It is adequately illustrated that International Law in different ages has risen to the occasion and provided norms to govern the prevalent forms of intelligence gathering.

Contemporary International Law recognizes various activities which are deployed by States in gathering intelligence. In time of armed conflicts, States use espionage, ordinary treason, war treason and reconnaissance. In times of peace, they deploy peacetime espionage and peacetime reconnaissance, but international and State practice show no evidence of the existence of peacetime treason based on the activity of intelligence gathering activities. The similarities and differences of these activities are treated in Chapter Three.

Among the international lawyers who have dealt with the subject of intelligence gathering activities, a debate has raged as to whether these activities are permitted or prohibited by International Law. In Chapter Four, this debate is resolved in favour of the proposition that International Law permits these activities. The Law of War and Armed Conflicts expressly permits these activities. The Law of Peace, on the other hand, has no prohibition against these activities. In the absence of such a prohibition, it is submitted that International Law permits them.

In Chapter Four and Five, it is clearly put forward and illustrated that International Law, while permitting these activities, does not prevent States from punishing intelligence gathering agents who fall into their power. The Law of Armed Conflict expressly permits punishment while municipal law in peace always provides

punishment for such agents. Only reconnaissance agents in times of armed conflicts may not be punished for their activities. If intelligence gathering agents are punished for their activities, then it is not because of the criminal character of these activities. Punishment is based on the State's inherent need to preserve itself.

A survey of the protection International Law offers to participants in intelligence gathering activities is conducted in Chapter Five. In the Laws of Armed Conflicts, these persons are beneficiaries of the protection offered by International Humanitarian Law. Both procedural and substantive safeguards are offered to all participants in intelligence gathering activities. War traitors and spies who are members of the armed forces in addition enjoy immunity for their previous acts once they have completed them and returned to the armed forces to which they belong. In peace, participants in these activities are protected by the International Law of Human Rights which ensures both procedural and substantive safeguards to all human beings. In addition, States, in order to ensure the safety of their agents sometimes cover them with diplomatic immunity. How diplomatic immunity has been used as a protection for intelligence activities is discussed in Chapter Five as well. In both armed conflicts and peace, some protections are common to both phenomena. The Law of Extradition provides such protection to both wartime and peacetime reconnaissance agents. Extra-legal protective measures are also relied on by States

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to protect their intelligence gathering agents. These too are examined in Chapter Five.

The final Chapter contains the summary and the conclusions of the thesis. The development of the International Law relating to intelligence gathering activities is depicted as evidence of the dynamic character of International Law in general. The protection offered by International Humanitarian Law in armed conflicts and by the Law of Human Rights in peacetime is seen as having lifted the status and persons of intelligence gathering agents from the twilight of International Law into its full glare. In spite of this appreciation, there are still dark spots to be erased. One is the death penalty for spies and war traitors in war. Imprisonment incommunicado for the duration of the conflict would suffice to serve the needs of self defence of a party to a conflict. This, too, would be in accord with recent developments in Humanitarian Law. The second spot is the need to extend immunity to war traitors and spies who are civilians for completed intelligence gathering activities.

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John Ntambirweki

Toronto, Ontario CANADA

31th July 1984

TABLE OF ABBREVIATIONS

A.D.	Annual Digest of International Law cases
All E.R.	All England Law Reports
A.J.I.L.	American Journal of International Law
B.Y.I.L.	British Yearbook of International Law
Cap.	Chapter
C.I.A.	Central Intelligence Agency of the United States of America
Col Law J.	Columbia Law Journal
(Ed)	Editor
I.C.J.	International Court of Justice
I.C.J. Reports	International Court of Justice Reports
I.C.R.C.	International Committee of the Red Cross
I.J.I.L.	Indian Journal of International Law
I.L.R.	International Law Reports
K.B.	Law Reports of the King's Bench Division, England
K.G.B.	Komitet Gosudastvennoy Bezopasnosti (Soviet Security Police)
L.Q.R.	Law Quarterly Review
No.	Number
P.C.I.J.	Permanent Court of International Justice
P.C.I.J. Ser A	Permanent Court of International Justice Reports Series A
Q.B.	Law Reports of the Queen's Bench Division, England
U.K.	United Kingdom of Great Britain and Northern Ireland
U.N.	United Nations
U.S.	United States of America
U.S.S.R.	Union of Soviet Socialist Republics
Vol.	Volume

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Andre's case in Halleck (1911)	5 A.J.I.L. 590
Attorney General for Israel v. Sylvester	15 I.L.R. case no. 190
Coleupagh v. Looney (1956)	23 I.L.R. 759
Ex Parte Quirin (1942)	371 U.S.1, also reported in 37 A.J.I.L. 152
Ex Rel Wessels (1919-1922)	1 A.D. case No. 298
In Re Buck et al	13 I.L.R. 293
In Re Dostler (1948)	15 I.L.R. 280
In Re Flesch (1947)	14 I.L.R. 307
In Re Flesche (1949)	16 I.L.R. 266
In Re Lippert (1950)	17 I.L.R. 432
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In Re Rauter (1948)	15 I.L.R. 435
In Re Reiger (1948)	15 I.L.R. 483
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S.S. Lotus case	P.C.I.J. Ser. A No 10
Trail-Smelter case (U.S. v. Canada) in Harris, D.J., " <u>Cases and Materials in International Law</u> "	(London, Sweet & Maxwell 1973) at page 231
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The Laws of War on Land, Manual Published by the Institute International Law (Oxford Manual) Adopted by the Institute of International Law at Oxford 9 Sept. 1880. (Text Schindler & Toman n. 49).

Convention II with Respect to the Laws and Customs of War on Land, signed at the Hague, 29 July 1899 (Text in Schindler & Toman . 57)

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Declaration of the Rights of Man and the Citizen 1789 (From Text in Brownlie p. 8)

Bill of Rights 1791. (United States) (Text in Brownlie p. 11)

Official Secrets Act, Kenya Cap 187. (Official text) in Laws of Kenya

Penal Code Kenya, cap 63 (official text) in Laws of Kenya.

CHAPTER ONE

INTRODUCTION

1:1:1

About Intelligence

The term intelligence has been aptly defined by Sherman Kent.¹ He gives three meanings of the term. In the first place intelligence means knowledge. The knowledge one state has about another is intelligence. In the second place, intelligence is used to mean an organization. Organizations which collect intelligence are known as Intelligence. In the U.S.A. for example, the Central Intelligence Agency, the Federal Bureau of Investigation, the Defence Intelligence Agency, the National Security Agency and some elements of the Atomic Energy Commission are referred to as Intelligence. Intelligence may also be used to mean the activity of collecting intelligence. Espionage is one form of intelligence in this regard.

The term intelligence as used in this thesis is confined to the first of the three meanings. Activities of gathering intelligence will be referred to as intelligence gathering activities. Intelligence as knowledge has been clearly defined by Harold L. Wilensky in his book Organizational Intelligence.² He defines it to mean Information, questions, insights, hypotheses, evidence relevant to policy including both scientific and political or ideological information, scientific or not.³ This wide definition is herein adopted.

The intelligence required by states is attained through a definite process. This process involves, in most cases, four stages. The first stage is the determination of the need, purpose, and time intelligence is required. The second stage is the collection of the required information. In this case different sources of information must be sought. Information may be acquired from overt or covert sources, or, from gaming otherwise known as creative intelligence. Once the information has been gathered, its evaluation and analysis follows. When its validity and adequacy has been determined, the information or raw intelligence is transformed into finished intelligence. Here the last stage of the process comes into play, the dissemination of the Intelligence. Unless Intelligence reaches the persons that must act upon it, the entire process fails.

This thesis is confined to only one aspect of the intelligence process, that of gathering the required information. It is to this specific aspect that attention is hereafter directed.

1:1:2

Gathering Intelligence

The Aims

In seeking Intelligence about another state, there are three aims that are always to be accomplished. The first aim is to determine the power of that state. The second aim is to determine the probability of the use of that power. The third aim is to determine when that power will be used, where it will be used and how it will be used. In

order to achieve these aims both in times of peace and war, states seek all kinds of information. They seek political, economic, military, scientific and geographic information.

The political information sought by states includes the public opinions on particular issues, political tendencies, the strength of political parties, communal jealousies within a state and most important of all public and secret political documents. These are important in determining the power of the state and how it may be used.

Economic information is also very important since the economic well-being of a state affects its political and military capabilities. Economic information sought includes external and internal trade of states, finances, economic growth, industrial and agricultural output, communications and reserves of strategic resources.

Since the prospect of military confrontation between states never looms far, information about the military forces of foreign states is a priority requirement by states. In this respect, information about the size of the forces, their location, training and capability as well as the nature of their equipment is highly prized. In times of armed conflict, this information assumes greater importance as good intelligence about the enemy forces is crucial for the attainment of victory.

Scientific information is also an important category of intelligence sought by states. The developments in scientific knowledge in

one country are clearly monitored by other countries, whether they be in physics, chemistry or biology. New weapons systems are of especial intelligence interest. Scientific discoveries greatly increase the power and capability of a state.

Nations closely study the geography of other nations. The coasts, borders and populations of other states are closely watched. The information realized here and from other areas of interest may indicate preparation for war, or the military capability of the state to defend itself. Today the observation of weather and climatic changes which may result into droughts and consequent famines, has become important. These observations could as well indicate the future economic and political changes in the state affected, from these changes the future bargaining behaviour of the state may be deduced, especially in matters of international trade.

In the international arena, states are the abstract actors while men are the real forces that change things. Due to this realization, intelligence agencies seek with care information about the men that lead nations. Their characters may be important in indicating the future tendencies of states. It is not on a few occasions that the fate of mankind has been at the mercy of the leaders of the world's most powerful states.

The Activities

There are different types of intelligence gathering activities. The activities undertaken depend on the nature of the information required. Information which is heavily protected cannot be obtained using the same methods that would be useful in obtaining information which is open to the whole world. This means therefore, that the methods used will depend upon whether the information is overt or covert.

With regard to overt information the intelligence gathering activities deployed are likewise overt. Overt information is that information which may be found in sources that are open to the whole world. These include the press, trade journals, official publications, scholarly journals, academic dissertations and textbooks. These sources provide very valuable intelligence. As one author has remarked, most scientific developments in a country may be obtained from scholarly works; for however secret a government wants a development to be, it can never prohibit scholars from publishing their discoveries.⁴

Intelligence from overt sources is collected openly with no secrecy. Diplomatic agents and their entourages have for centuries been used as the main channel for this activity. Recently, exchanges of academic materials between academic institutions has become another valuable avenue for the collection of this type of intelligence.

Where intelligence sought is secret and particularly protected, states deploy covert activities to obtain it. The oldest of these covert intelligence gathering activities is the use of secret human agents to uncover the required information. Secret agents may be sent by the state seeking the information from among its nationals to penetrate the ranks of the other state and recover the information. Alternatively, nationals of the target state may be "induced" to provide the required information. States also use nationals of a third state.

The developments of modern technology, especially of photography and electronic eavesdropping, have provided yet a new area of covert intelligence gathering activity. Airplanes have been used to photograph ground defence facilities since World War I by states. This has been done either from the airspace of the target state or from the airspace of the High Seas adjacent to the target state. Airplanes also carry out electronic eavesdropping either above the High Seas or above the territory of states. Surface ships and submarines have also been developed to carry out some of these tasks of photography and eavesdropping.⁵ Since the launching of the first man-made satellite into outer space in 1957, outer space has become an area of immense intelligence activity. The Super Powers in particular have launched intelligence gathering activities in outer space. Satellites capable of photographing defence, industrial and economic facilities of states and sending back messages to earth have been developed. These have extended the race to acquire intelligence into space - an integral aspect of the arms race.

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In addition to activities in outer space, airspace and the High Seas, intelligence gathering facilities have been installed by states on territories neighbouring the target states and within these target states. In particular, electronic eavesdropping equipment has been deployed.

Besides gathering intelligence from covert or overt sources, intelligence may also be gathered by creative activity. For centuries now, highly trained researchers with the help of initial information obtained from overt sources, or from covert activity, have been able to determine the future courses of events. Gaming, as this activity is known, has been particularly favoured by academic and research institutions. There have been incidents in history which have been successfully "gamed out" before they occurred.⁶

1:1:3

The Interaction of Intelligence Gathering Activity & International Law

An international activity of the dimensions of intelligence gathering in the contemporary world cannot escape regulation by International Law. Intelligence gathering by states is an activity that they undertake out of necessity. As the need for intelligence has increased among states, they have had to take necessary measures to protect their political, military and economic secrets.

Just as intelligence gathering has been perfected into an elaborate science, counter intelligence activity has also been perfected to

a like degree. The struggle between counter intelligence activity and intelligence activity has led in time of war to the harassment of whole populations as well as individuals on accusations of supplying intelligence to the enemy. In times of peace this struggle has led to incidents that have threatened peace and are therefore of immediate concern to international law.⁷

Besides, intelligence gathering activities give rise to questions of non-interference, territorial sovereignty and the situation of persons involved under International Law. This thesis examines this interaction between intelligence gathering activities and International Law.

1:2:0

The Scope of The Thesis

This thesis covers intelligence gathering activities in times of armed conflict and peace. In times of armed conflict it covers the activities of espionage, ordinary treason, war treason and military reconnaissance. It does not cover the interrogation of war prisoners or civilian persons, nor intelligence from captured enemy weapons.

In times of peace this thesis is mainly intended to cover activities, which have been characterized as peace time espionage and peace-time reconnaissance. It does not cover the traditional methods of diplomacy through which valuable intelligence is realized by states. It does, however, cover instances where the paraphernalia of diplomacy is used to cover reconnaissance agents.

With regard to all these activities, the thesis is directed at the following specific considerations:

- (a) The evolution of the international law relating to intelligence gathering activities.⁸
- (b) The legal definition of the various activities under International Law.⁹
- (c) The position of the various activities under International Law.¹⁰
- (d) The position of persons involved in these activities and the protection offered by International Law to those persons.¹¹
- (e) A critique of the law as it stands today.¹²

These themes of this study arise from the literature available on the subject.

1:3:0

The Literature Review

Whereas considerable attention has been paid to the subject of intelligence gathering in International Law by jurists, no important work has been solely devoted to this aspect of international activity. Much of the writing has been in general texts on International Law or in scholarly articles. In both cases, less than adequate treatment has been given to this complex subject. The articles treat

aspects of the problem while the textbooks do little justice to the problem by treating it in a summary fashion. In this short synopsis both are reviewed.

A The Early International Law Publicists: Legnano, Gentili, Ayala, Grotius, Wolf, Bynkershoek and Vattel¹³

These early publicists identified two intelligence gathering activities; espionage and ordinary treason during times of war. They did not pay any particular attention to intelligence activities in times of peace. They do not mention them at all.

Wartime espionage was regarded as one of the many ruses of war. It was permitted as a belligerent activity. While it was so permitted, the publicists argued that the individual participants in espionage - the spies - could be punished by the enemy if they fell into his hands. The basis of the punishment was not in the illegality of the activity but rather on grounds of self-defence and the deterrence of persons who may wish to serve in that capacity in future. The spy was looked upon as a hidden device, which could cause a lot of injury to a belligerent and hence the need to deter espionage. The views of the early publicists are the foundation of the law today. In this thesis, an attempt will be made to determine whether these views can be justified today.

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The early publicists distinguished spies from traitors. Spies were those sent by the belligerent to find out about the enemy.

Traitors were those who, while owing allegiance to a state, betrayed its vital information to the hostile party. This thesis examines this distinction.

B

The Works of The Nineteenth Century 14

The leading publicists of the nineteenth century followed the lead of the earlier publicists. Intelligence activities were conceived only in times of war. Peace time intelligence activity was ignored. The main activity which attracted the attention of the publicists was war time espionage. The legality of the use of spies by belligerents was accepted. At the same time they accepted the right of a belligerent on the basis of self defence and deterrence to punish captured enemy spies. The distinction between traitors and spies was also maintained.

A third category of intelligence activity during war emerged. This was war treason. In its initial formulation war treason was those intelligence activities and acts of subversion carried out by inhabitants of an occupied territory. Not being subjects of the belligerent occupant, they were not traitors and because they were not sent by the enemy, they were not spies. Hence the emergence of war treason - treason based on the peculiar conditions of war. After the codification of the laws of war, in the second half of the 19th Century, war treason came also to cover all those activities of gathering information which did not fit in the treaty concept of

espionage. In this study, an examination of the concept of war treason is one objective.

c

Works of The Twentieth Century

In this century international lawyers have paid some considerable attention to the problem of intelligence gathering activities in International Law. Since this literature is the best evidence of the present state of the law, it is here given fuller treatment.

1. Intelligence Activities in Times of Armed Conflict

(a) Wartime Espionage: The law relating to wartime espionage as expounded by the early publicists has been codified in international treaties.¹⁵ International lawyers have, therefore, continued to follow the lead given by the earlier sages.

(i) Oppenheim: International Law A Treatise Volume 2 ¹⁶ In his treatise, Oppenheim reiterates the law as it was laid down by earlier publicists. He accepts the legitimacy of espionage as a belligerent activity. He also recognizes the right of a belligerent to punish captured spies. According to Oppenheim, the basis of punishment is that espionage is a war crime which is punishable only during war. He, however, distinguishes espionage as a war crime from those war crimes which involve the violation of the laws of war, such as mass murder, or violation of truces, or the breach of the Geneva Convention.

(ii) **Verzijl: International Law In Historical Perspective** ¹⁷ Like Oppenheim, Verzijl restates the customary law on the subject. In like manner, he does not evaluate the relevance of this law in conditions of modern armed conflicts.

(iii) **Hyde: "Aspects of the Saboteur Cases"** ¹⁸ In this article, Hyde argued in favour of the ruling of the U.S. Supreme Court in Ex parte Quirin. ¹⁹ In that case the Supreme Court was of the view that spies were offenders against the Laws of War and were therefore liable to be punished for those acts which made them unlawful combatants when captured. This view was commended by Hyde as a fresh and bold view of the position of spies in war.

(iv) **Baxter: "So-Called Unprivileged Belligerency, Spies, Guerrillas, and Saboteurs"** .²⁰ In this article Baxter refuted the view of the Supreme Court in ex parte Quirin ²¹ and that of Dr. Hyde that spies were unlawful combatants. Baxter's argument was based on the classical publicists and on the Dutch case of Re Flesche.²² According to Baxter, spies were lawful combatants who are nevertheless unprivileged as they cannot be treated as prisoners of war. Instead they are punished on the basis of the need of the belligerent to defend himself from enemy spying and in order to deter future spies.

(v) **Julius Stone: Legal Controls of International Conflict** .²³ In his discourse on unprivileged belligerency, Stone supports Baxter's thesis. Spies are unprivileged combatants but are not unlawful combatants. He goes further to suggest that in conditions of modern

war, there is need to reconsider categories of unprivileged belligerency.

(vi) Conclusion on the Literature on Wartime Espionage: The works reviewed above show that jurists and courts of law have been unable to agree as to the exact position of espionage in International Law. Secondly, the law has not been scrutinized in the context of modern armed conflict. Thirdly, there is no literature on recent developments in the treaty law of armed conflict, especially on article 46 of Protocol 1, additional to the Geneva Conventions of 1949 (1977). This thesis is addressed to all these problems.

(b) Ordinary Treason: Among the works of the twentieth century little has been said of ordinary treason in times of armed conflict and its place in International Law. The rigid tendency to respect the domestic jurisdiction of states may explain this. International Law, until after World War II, was always reluctant to interfere in the relations between a state and its subjects. Though tendencies have since changed, it is not surprising therefore that there has been only one major study of Ordinary Treason in World War II.

(i) Yale Law Journal: "Wartime Collaborators: A comparative Study of the effect of their Trials on the Treason Law of Great Britain, Switzerland and France".²⁴ This note illustrates that the use of ordinary traitors in war is common. This of course, implies that it is still an important means of gathering intelligence. It shows how states adjusted their wartime treason laws to prevent the use by the

enemy of their citizens in gathering valuable information to their prejudice.

In this study the problem of wartime ordinary traitors under international law is fully explored.

(c) War Treason: While the concept of war treason was first formulated in the 19th century, it has been delimited in the 20th century through the writings of jurists and the provisions of conventional law. As such, some valuable works can be found on the subject of war treason.

(i) Oppenheim: International Law - A Treatise. Volume 2 ²⁵

Oppenheim gave attention to the problem of war treason in his Treatise. Hostile activities committed by persons within the lines of the belligerent were war treason and the belligerent had a right to punish them. He went further to explain that like espionage, war treason was not an offence against the laws of war but was punished by the belligerent on the basis of self defence and deterrence.

(ii) Morgan: "War Treason": ²⁶ Morgan in this article expressed displeasure at the emphasis given to the concept of war treason by Prof. Oppenheim in his Treatise.²⁷ He argued that the concept of war treason was unknown to International Law but had merely been invented by the German occupation armies in order to support their hold over the people of the occupied territory in World War I.

(iii) Oppenheim: "On War Treason".²⁸ and "The Legal Relations Between the Occupying Power and The Inhabitants":²⁹ In these two articles, Oppenheim refuted the observation of Morgan. He showed that the concept of war treason was known to and accepted by publicists of all nations. According to Oppenheim, it had originated from the practice of nations and first found expression in the American Instructions of 1863. According to Oppenheim, all acts of the population in the lines of a belligerent, intended to favour the enemy except espionage and open rebellion in arms, are war treason. These acts include the giving of any information to the enemy that may be of military value. The belligerent, endangered by these activities, has the right to punish their perpetrators. The right to punish the perpetrators of these acts was based on the duty of obedience owed to the belligerent by the population. This duty arose from the fact that the enemy had physical control of the territory and not from any allegiance owed by the population.

(iv) Baxter: "Duty of Obedience to the Belligerent Occupant".³⁰ In this article, Baxter favours the view that a duty of obedience by the population of occupied territory originates from the occupant's physical control of the territory. He rejects the theories that the duty of obedience is based on either allegiance or temporary allegiance, or a duty created by international law, or a duty created by municipal law. In asserting this view, he reaches a conclusion similar to that of Oppenheim. He goes further to say that acts of war treason or war rebellion constitute a breach of this duty. With war treason he explains that it is not peculiar to the law of belligerent

occupation; it may be committed any where within the lines of a belligerent. He explains however, that belligerents have always resorted to war treason to punish persons who commit hostile acts against them. He concludes that at present, International Law permits the belligerent occupant to prohibit and punish hostile acts of the population in occupied territory subject to the provisions of the Hague Regulations, Geneva Conventions, and reasonableness. At the same time, he asserts that International Law does not prohibit the population from committing such acts. Whether or not such acts will be punished will depend upon the legislative enactments made by the occupying power. Like the spy, Baxter argues, the war traitor, may not be penalized for his acts once he has rejoined the army to which he belongs.

This article does not catalogue what acts constitute war treason. It does not specifically say what acts of gathering information constitute war treason as distinct from espionage. Since this thesis is addressed to the problem of the International Law relating to intelligence gathering activities, these aspects will be fully considered.

(v) Conclusion from the Literature on War Treason: While the International Law relating to War Treason has exercised the mind of many a jurist, the effort has been directed at finding the basis of the notion. Little effort has been made to distinguish it from other intelligence gathering activities in time of armed conflict, such as espionage and ordinary treason. In this thesis, as well as

revisiting the problem of the basis of the punishment of war traitors, an elaboration of the concept of war treason in as far as it relates to intelligence gathering, shall be attempted.

(d) Wartime Military Reconnaissance. There has been remarkably little written about this activity. In the conventional law, it is merely distinguished from espionage.³¹ Reconnaissance does not render the persons involved punishable when captured. They are treated as other ordinary combatants and are granted prisoner of war status. The text writers simply restate this view without going into the niceties of distinguishing clearly this activity from other intelligence gathering activities in wartime.³²

2. Activities of Intelligence Gathering in Time of Peace:

Unlike in previous centuries, jurists have given some attention to the place of peacetime intelligence activities in International Law. The opinions shown sometimes conflict and reflect some confusion as to the concepts involved and their content.

(a) Peacetime Espionage

(i) Oppenheim: International Law; A Treatise Volume 1:³³ Oppenheim mentions the practice of peacetime espionage in his famous Treatise. According to him peacetime espionage was a common practice of states, although spies were not recognized agents of states. If spies violated Municipal Law, they would be penalized under it. Oppenheim's

summary treatment of the subject does not clarify the position of peacetime espionage in International Law nor does it throw sufficient light upon the situation of the peacetime spy.

(ii) Quincy Wright: "Legal Aspects of the U-2 Incident": ³⁴ This article enkindled the debate on the place of peacetime espionage in International Law that characterized the early sixties. Quincy Wright maintained that whereas states use espionage in peacetime, it is an illegal practice not permitted by International law. The state that sends a spy is in breach of International Law, although this breach does not amount to aggression. States, he argues, recognizing this illegality do not seek to protect the captured spy. It was this view that sparked off the debate on the place of espionage in International Law.

(iii) Gihil: "Who is A Spy": ³⁵ Prof. Gihil disagrees with Quincy Wright on the place of peacetime espionage in International Law. He argues that there is nothing to suggest that the practice is an international delinquency. International Law does not prohibit peacetime espionage. He further disagrees with Quincy Wright as to whether Francis Gary Powers, the U-2 pilot was a spy. He argues that Powers was not a spy. He was a state agent who flew a state reconnaissance plane and who was later acknowledged by the U.S.A. Lacking the elements of clandestinity or 'false pretences, he argues the U-2 incident did not involve espionage.

(37)

(iv) Julius Stone: "Legal Problems of Espionage in Conditions of Modern Conflict":³⁶ Stone takes the same position as Gihil in regard to whether peacetime espionage is permitted by International Law. In the absence of an express rule of International Law prohibiting espionage in time of peace, he says, the practice must then be treated as permitted. For this proposition, he relies on the authority of the S.S. Lotus Case.³⁷ In addition, he argues peacetime espionage must be created as permitted in conditions of modern conflict. It is an insurance against surprise attacks and therefore, a deterrent against war.

Stone further characterizes acts of gathering intelligence by the use of space satellites and state aircraft as espionage, a proposition rejected by Gihil.

(v) Ahluwalia: "The Question of The U-2 Incident and International Law":³⁸ In this article the author assumes the same position as Quincy Wright. Espionage in peacetime is not legal between nations as it may lead to dangerous consequences for international order and in time of peace, cannot be justified on grounds of self-defence. Like Quincy Wright and Stone, he looks at the U-2 Incident to have been one of espionage.

(vi) Conclusion on the Literature on Peacetime Espionage: The literature reviewed shows that there is no unanimity of legal opinion as to what constitutes peacetime espionage as an intelligence gathering activity in International Law. It also shows that there is no

agreement between the various eminent jurists as to the place of peacetime espionage in International Law - whether it is permitted or not. This thesis is addressed to this problem.

(b)

Peacetime Reconnaissance

Since the U-2 Incident in 1960, there has been a certain amount of writing on what has come to be known as reconnaissance, an activity of gathering intelligence.

(i) Oliver Lissitzyn: "Some Legal Aspects of the U-2 and RB47 Incidents": ³⁹ Lissitzyn looks at these two incidents not as of espionage but of reconnaissance of foreign territory from the air. He does not press the issue of reconnaissance as far as determining its legality and character under International Law. He instead analyzes the sovereignty of a state over the air space suprajacent to it and over the airspace suprajacent to the High Seas adjacent to the state. In spite of this short treatment of the issue of peacetime reconnaissance activities, the article is important in indicating that besides peacetime espionage there are other intelligence gathering activities.

(ii) Columbia Law Journal: "Legal Aspects of Reconnaissance in Air Space and Outer space". ⁴⁰ In this note it is made clear that reconnaissance in air space and outer space is an activity distinct from espionage under International Law. While the nature of reconnaissance in outer space and in air space and its position in International Law are properly analyzed in this article (a thesis similar to that

followed presently), other forms of reconnaissance were neither mentioned nor analyzed.

(iii) Conclusion on the Literature on Reconnaissance in Peacetime:

There is a considerable paucity of literature on the subject of peacetime reconnaissance. This is because it is a new area of International Law. Besides, it is still unclear where espionage stops and reconnaissance begins in peacetime.

"D"

General Conclusions on the Literature Review

From the literature reviewed it may be said that activities of gathering intelligence have received some attention from International lawyers through the centuries. This attention has however, been far from sufficient. Confusion of the various activities of intelligence gathering is manifest in several works. The jurists are not agreed on the place of several of the various activities of intelligence gathering in International Law. The question whether these various activities are permitted or prohibited by International Law has been answered variously. Clarification of these conceptual problems is indeed necessary.

There has been little effort in the study of the fate of persons involved in these activities. The protection International Law offers them is nowhere fully explained. This is yet another matter that requires considerable attention.

There have also been developments in the law relating to intelligence gathering activities. This is true particularly in the Law of Armed Conflicts. There has been no legal discussion on how these recent developments affect the previous customary and conventional law. A reflection upon this is indeed a contribution to knowledge.

Changing technology has also brought its own ramifications into the existing law. The impact of technological development, or its accommodation in existing law, needs to be looked at.

All in all, a systematic re-organization of knowledge on the subject of intelligence gathering activities in contemporary International Law, is required. As well, a reflection upon recent developments in the law and in the technology of intelligence gathering and their impact upon the International Law is needed.

1:4:0 Statement of The Problem Investigated in The Thesis

This thesis is addressed to the problem of intelligence gathering activities in International Law. As shown in the literature review, no study exists that looks at these activities of states as a complete aspect of international life and assesses their impact on International Law.

This thesis aims in the first place at explaining the historical development of the International Law relating to intelligence gathering activities to the present day.

Since the literature review shows that there is considerable confusion in legal circles as to the legal conception of the various intelligence gathering activities, this thesis aims at clarifying these concepts.

There has been a debate as to the legality or illegality of the various intelligence gathering activities as shown in the literature review. This thesis intends to contribute to this debate with a view of resolving the conflict of opinions.

In view of the heavy punishments meted out to persons who carry out intelligence activities, and in view of the captors occasional abuses carried out against such persons, this thesis explores what fate is appropriate to these persons, and what humanitarian guarantees of treatment and rights are due to these persons. The thesis goes further to explore various extra-legal forms of protection available to these persons.

1:5:0

Rationale For The Study

This thesis answers a challenge. That challenge is the lack of properly considered writings on the subject of intelligence gathering activities. It is an attempt to clarify the law as it stands today regarding these activities. By responding to this challenge, the thesis is a modest contribution to the study of law.

1:6:0 Research Method Used and Location Of Research

The nature of the problem has dictated both the methods used and the location of the research. No field work has been undertaken and the entire work has been done in the library. Primary sources of data such as treaties, municipal legislations, decided cases, resolutions and debates of international organizations and original works of the most eminent publicists have been consulted. Secondary sources, mainly the works of text writers on International Law, where original sources were not available, have been used.

1:7:0 Manner of Exposition of The Subject

Although what has been written on the subject by various authorities is often at variance, it will form the starting point of the discussion that follows. The entire thesis is a criticism and appreciation of what has been written by those before the author. Several quotations will be made from the various works and their discussion will follow in full in order to point to new directions or to reaffirm what is asserted. John Maynard Keynes, the Economist and Philosopher once wrote:

"The writer treading along unfamiliar paths is extremely dependent on criticism and conversation if he is to avoid an undue proportion of mistakes. It is astonishing what foolish things one can temporarily believe if he thinks too long alone . . ."

FOOTNOTES

1. In Strategic Intelligence footnoted in Copeland, Miles, The Real Spy World, (London, Weidenfeld & Nicolson, 1974) p. 87.
2. New York, Basic Books 1967.
3. At p. (iv).
4. Copeland op. cit. pp. 50-77.
5. Intelligence Gathering Activities from the sea have been clearly outlined by Deacon, Richard in his book The Silent War - A History of Western Naval Intelligences, (London, David & Charles 1976).
6. See Wilson, Andrew, War Gaming (Harmondsworth Penguin Books 1970)
7. "The U-2 Incident in 1960". When a U.S. reconnaissance plane was shot down inside U.S.S.R. territory. It created international tension between the super powers. Earlier an Israeli airliner of EL AL Airlines had been shot down over Bulgaria by Bulgarian forces on 27th July 1955. It was suspected of carrying out intelligence gathering activities. In 1973, Israeli forces shot down a Libyan passenger airliner on the same grounds. In September 1983, the forces of the U.S.S.R. shot down a South Korean passenger plane killing 269 passengers aboard. The plane was suspected of carrying out intelligence gathering activities, having overflown Soviet military bases in the Far East. This increased East-West tensions. Besides these activities, massive expulsions of diplomats from both East and West have been effected. Topping the list of expulsions is that of 102 Soviet diplomats from Britain on a single day in 1971. All these diplomats were alleged to have been involved in intelligence gathering activities, especially the theft of High Technology from West to East.
8. Covered in Chapter 2 infra.
9. Covered in Chapter 3 infra.
10. Covered in Chapter 4 infra.
11. Covered in Chapter 5 infra.
12. Covered in the Conclusion.

13. Legnano: Tractus de Bello de Reprisalis et de Duello (Translated by T.E. Holland in 1917) at p. 271.
 Gentili, Albercio: De jure Belli Libri Tres, Edition of 1612 (Translated by C. Rolfe) see pp. 173-175.
 Ayala Bathazar: De Jure et Officis Bellicis et Disciplina Militari Libri Tres. Edition of 1581 (Translated by J. P. Bate in 1912) pp. 218-221.
 Grotius, H.: De Jure Belli ac Pacis Libri Tres. Edition of 1646. (Translated by F. Kelsey in 1925. New York, Oceana 1964) (Reprint). Wolf: Jus Gentium Methodo Scientifico Pertractatum.

Edition of 1764 (Translated by J. Drake 1934) see pp. 452-453.
 Bynkershoek: Questiona Juris Publici Libri Duo. Edition of 1737 (Translated by T. Frank in 1930) see p. 15. Vallil: The Law of Nations or Principles of Natural Law. Edition of 1758 (Translated by C. G. Fenwick in 1916) see pp. 296-387.

All these classical authorities were reprinted by Oceana Publications Inc., New York, 1964.

14. Good examples here include Halleck: "Military Espionage" (1911) Vol. 5 A.J.I.L. 590. (This article was written by General Halleck during the American Civil War. It was found among his papers upon his death in January 1872. It was eventually published in the A.J.I.L. in 1911 and reflects upon and explains the position taken by Halleck in his International Law. See also Lawrence: Principles of International Law, (London, McMillan & Co., 1895) pp. 426-428. The same position is also held by the Instructions for the Government of the Armies of the U.S. in the Field of 1863. Drawn up by Dr. Francis Lieber of Columbia University, Articles 88-104. (Herein cited as the American Instructions of 1863). Sir Henry Maine: International Law, New York, Henry Holt & Co., 1888, see pp. 148-151, is of the same view. See also W. E. Hall: International Law, (Oxford, Clarendon Press 1895), see pp. 559-560.

15. Brussels Declaration of 1874, Articles 19, 20, 21, and 22. Oxford Manual 1880, Articles 23, 24, 25 and 26. Hague Regulations Annex to Hague Convention IV of 1907, Articles 24, 29-31 (inclusive). Protocol I Additional to the Geneva Conventions of 12 August 1949, Articles 37, 38, 39 and 46.

16. (London, Longmans Green & Co., 1906, First Edition).

17. Leyden, Sijthoff 1978, Vol. 9, pp. 138-148.

18. (1943) 37 A.J.I.L., 88.

19. (1943) 37 A.J.I.L., 152. See also Coleupagh V. Looney 23 I.L.R. 759.

20. (1951) Vol. 28 B.Y.I.L., pp. 223-245.

21. See note 19 above.

22. (1949) 16 I.L.R., 266.
23. 2nd Revised Edition (Sydney, Maitland Publications Pty Ltd) 1959, pp. 562-570.
24. (1946-1947) Vol. 56 Yale Law Journal, , pp. 1210-1233.
25. Supra note 15 above.
26. (1916) Transactions of the Grotius Society, pp. 161-173.
27. Just reviewed above.
28. (1917) Vol. 33 L.Q.R., pp. 266-286.
29. (1917) Vol. 33 L.Q.R., pp. 363-370.
30. (1950) Vol. 27 B.Y.I.L., pp. 235-236.
31. See Art. 29 of the Hague Regulations of 1907.
32. Von der Heydte, "Military Reconnaissance" in Bernhardt (Ed) Encyclopaedia of Public International Law, (Amsterdam, North Holland Publishing Co. 1982) Vol. 3, pp. 279-281.
33. (London, Longmans, 1952.) 8th Edition by Sir H. Lauterpacht , p. 840.
34. (1960) Vol. 56 A.J.I.L. 836.
35. In Legal Essays - A Tribute to Frede Casteberg, (Oslo, 1963) pp. 230-241.
36. In Stanger R. J. (Ed) Essays on Espionage and International Law, (Ohio State University Press 1962.) Also reproduced in Stone J., Of Law and Nations, (Buffalo, Williams Hein & Co. 1974) pp. 271-284.
37. P.C.I.J. Series A No. 10.
38. (1961) Vol. 1 I.J.I.L., pp. 301-307.
39. (1962) Vol. 56 A.J.I.L. 135.
40. 1961 Vol. 61 Col. Law J., pp. 1074.
41. Keynes J.M.: The General Theory of Employment Interest and Money, (London, McMillan 1936) p. (vi).

CHAPTER TWO

INTELLIGENCE GATHERING ACTIVITIES AND
INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE2:1:0: Intelligence Gathering Activities in History:

Intelligence gathering activities have been carried out by states in all ages of human history. This is reflected in both the oral and written history of nations. Occasions of successful intelligence gathering activities, especially of adventures of espionage, decorate some of the most glamorous pages of the books of the history of nations. Secrecy makes most intelligence activities remain secret and are never known. In spite of this, secrecy has not prevented the leaking out of certain incidents which have been committed to writing or to oral tradition.

In the ancient world the search for intelligence was an important activity of states, especially in times of war. In Ancient Egypt the Pharaohs used espionage in fighting their wars. The chroniclers of Ancient Egypt recorded an incident five thousand years ago during the reign of Pharaoh Tuthmosis III in which espionage was successfully used. A captain Thute, with the aid of spies, succeeded in smuggling two hundred heavily armed soldiers sewn in sacks as a shipment of flour into the city of Jaffa¹. The Bible shows that intelligence gathering activities were used by the Ancient Jews. In one incident,

the Almighty God himself is said to have commanded Moses to send spies into Canaan to spy out the land².

The ancient civilizations of the Far East also indulged in intelligence gathering activities. The ancient Chinese philosopher, Sun Tzu, who lived around 400 B.C. in his book Ping Fa (The Art of War) described the importance of a good intelligence system in war and statecraft. Sun Tzu identified five kinds of secret agents who in function and description correspond to the contemporary "agent in place", "double agents", "deception agents", "expendable agents", and "penetration agents"³.

Other ancient civilizations, Greece, Rome, Persia and Carthage also recognized the importance of and deployed intelligence gathering activities. The Greeks particularly used secret intelligence gathering activities as a source of strength in their struggles against the Persians. During the reign of Emperor Xerxes of the Persians, Greek spies in his court communicated about his warlike intentions and preparations against Greece to their homeland. They wrote in minute lettering on wood and covered it with wax as well as on bandages covering alleged wounds of Greeks travelling from Persia. As a consequence of these warnings, the Greeks were able to resist the great Persian conqueror. In the struggles between Rome and Carthage, the employment of spies by both sides was likewise common⁴.

In the Medieval World, activities of gathering intelligence were carried out by states on a large scale. Shubotoi, the Mongol leader,

relied on the information supplied by his spies in Europe to extend his influence and power. His spies were able to pinpoint the weaknesses of the Europeans which he exploited. The Europeans who had a poorer intelligence gathering apparatus and knew less about the Mongols, could not respond to the latter's threats appropriately. In the same period, the English King managed to defeat Joan of Arc by employing the Bishop of Beauvais as his spy.

The search for intelligence became more pronounced in the Fifteenth, Sixteenth and Seventeenth Centuries as European nations struggled for the dominion of the seas and foreign lands. The sharpest point in the struggle was the defeat of the Great Spanish Armada by the English in 1588. The victory of the British has been attributed to the successful organization of espionage rings in Spain by Queen Elizabeth I's Secretary of State, Sir Francis Walsingham. Through these espionage networks, Sir Francis was able to foretell when King Phillip II of Spain would launch the Armada and therefore prepare the English response⁵.

In this period, espionage and other forms of intelligence gathering activity ceased to be dominantly battlefield pre-occupation. They became strategic considerations. States began deploying intelligence gathering activities in peace. These were especially carried out by diplomatic missions which by now had become permanent features of day-to-day European diplomacy. There are several instances in the history of this period in which espionage was organized by ambassadors from their embassies⁶.

In Europe, the struggle among the various nations for the domination of the continent took place, but not without the organization of huge intelligence networks. Cardinal Richelieu of France conducted a successful foreign policy which saw the rise of France into the premier power of continental Europe. This was through the successful co-ordination of intelligence activity with diplomacy. It has been asserted that what was achieved for France through these means would have been difficult to achieve in many open wars⁷. In a like manner, Fredrick the Great of Prussia, was able to transform an insignificant dukedom into the Kingdom of Prussia, one of the foremost military powers of Europe. Fredrick praised the use of peasants as spies⁸.

In the 19th Century, the importance of good intelligence gathering activity in the successful conduct of statecraft was not forgotten. Napoleon I, the French Conqueror, said: "one spy in the right place is worth 20,000 in the field."⁹ While the Duke of Wellington wrote:

"As a nation, we are bred to feel it a disgrace even to succeed by falsehood. The word spy conveys something as repulsive as slave. We keep hammering along with the conviction that 'honesty is the best policy' and that truth always wins in the end. These pretty little sentences do well for a child's copy book, but the man who acts upon them in war had better sheathe his sword for ever. Spies are to be found in every class of society and gold that mighty lever of men is powerful enough to unlock secrets that would otherwise remain unknown at the moment. An English general must make up his mind to obtain information as best as he can, leaving no stone unturned".¹⁰

Napoleon relied on the discontented European middle classes and the oppressed peasantry for intelligence. It was this intelligence

that was the fulcrum of his gigantic military victories. Where there were no middle classes to support him, in Russia, Spain and Portugal for instance, his military adventures ended in defeat and eventual disaster for his empire as a whole.

The organization of an efficient single intelligence agency in Prussia by Wilhem Steiber (one of Bismarck's aides) provided an important source of accurate information upon which Bismarck relied in the conduct of foreign policy. Bismarck's significant diplomatic and military victories over Austria in 1866 and France in 1871 which led to the creation of a Unified Germany, were the results of the coordination of diplomacy and intelligence activity¹¹.

After the second half of the 19th Century, States in Europe continued creating permanent specialized intelligence organizations. Out of these new organizations, a cadre of career intelligence officers emerged, operating in both peacetime and wartime. This development was the result of increased sensitivity by European nations about their security. The European scene was chaotic, with the emergence of the giants Germany and Italy, in addition to the existing empires of Britain, France, Russia and Austria-Hungary. The balance of power in Europe had become delicate and unreliable. If the smaller states had to avoid being swallowed up by the larger ones, these states had to keep themselves informed about their intentions. More important, the larger states had to be informed about each others intentions and power. It was in this climate that permanent intelligence gathering organizations were born.

In the 20th Century this trend has continued. Both for conducting diplomacy in peace and winning battles in war the possession of good intelligence has been an important pre-requisite. While in the past the emphasis was on intelligence gathering through covert activities, especially espionage, in the Twentieth Century the emphasis has shifted towards a fuller utilization of overt sources. The development of technology has greatly aided the collection of covert intelligence. This is especially true of the perfection of the science of photography from the sea, airspace and from outer space. As important has been the development of electronic eavesdropping from the high seas, from within the target state, from space and from neighbouring territory.

Today not only is intelligence gathering activity still important for states as in days gone by, but it is also more wide ranging. Its methods have increased and become more sophisticated. In a world dominated by inter-block and interstate rivalries and jealousies, there can be no other prediction than that intelligence gathering activities will continue to be pursued by States.

2:2:0 THE DEVELOPMENT OF INTERNATIONAL LAW RELATING TO INTELLIGENCE GATHERING ACTIVITIES

In their antiquated history, intelligence gathering activities have not escaped the attention of International Law. The earliest Publicists, the fathers of modern International Law, paid considerable attention to these activities. This law continued to develop in the

nineteenth and twentieth centuries. In this part of this chapter, the foundations of the present law are examined and a synopsis of the main developments upon the law is given.

2:2:1

Foundations of the Present Law:
The Views of the Early Publicists¹²

The early International Law Publicists interpreted the Ancient and Medieval as well as their own world to discern the rules that governed nations. Since International Law, as it is known today, owes its nature and character to what these learned men wrote, a discourse on the International Law relating to an ancient state activity, such as intelligence gathering, should begin with their views.

The Publicists concerned themselves mostly with covert activities of gathering intelligence where States employed secret human agents. They generally identified two activities - espionage and treason as activities carried out by such secret agents. The Publicists concerned themselves with the concept of these activities in the law of nations, and whether these activities were permitted between nations by the law of nations, and further, what fate faced the participants in these activities.

The works of the Publicists contain no definition of the term espionage. Instead, they said who spies were. Vattel says:

"The use of spies in time of war is a species of deceit or underhand dealing. They are persons who insinuate themselves with the enemy in order to find out the condition of his army, study his plans, and then report this information to their masters"¹³.

In the works of the Publicists, the spy was conceived only as an actor in time of war. None of the Publicists speaks of espionage in time of peace. They, in fact, emphasised the importance of espionage in war. Wolf says:

"There is no more common practice in war than hiring spies since it is of the greatest importance that we should find out what the enemy is planning."¹⁴

From what the Publicists said of spies, their concept of espionage may be deduced. Espionage was a wartime activity in which nations hired spies to find out information about the forces of the enemy nation. In order to achieve this purpose, the spies used deception and clandestine means.

On the question as to whether the use of spies in time of war was permitted between nations, the Publicists were unanimous that it was permitted. According to Gentili¹⁵, it was not unlawful to commission spies because it was necessary to watch the actions of the enemy, and men had been obliged to do so in every age and in every way. Grotius¹⁶ puts it beyond doubt that if there were any that refused to use spies then it was not on the basis of what was unjust or just but rather on their confidence to act openly. Wolf justified the use of spies in like manner¹⁷ whereas Van Bynkershoek defines war as a contest between two independent states carried on by force or fraud for the sake of asserting their rights¹⁸. In this wide definition, espionage could not be ruled out as a permitted activity. Further justification for the permission of espionage in war was that it had always been carried on by all nations in all ages. Even the Almighty God, they argued, ordered Moses to send spies into Canaan.

As to what should be done to the captured spy, the Publicists were also unanimous. The spy would be punished with death either by hanging or burning alive. The question which arose from this unanimous condemnation of the spy was whether it was not incongruous with the legality of the activity. The Publicists were of the view that the spy was a hidden device, a secret weapon. He could do untold harm to the belligerent. It was a matter of justice that the belligerent be given a means under the Law of Nations of protecting himself from such a hidden device. The belligerent could therefore impose the death sentence on spies as a means of self-protection and in order to deter those who in future may want to serve in the capacity of spies. The most eloquent explanation of the legality of espionage and at the same time of the right of the belligerent to punish spies is that of Gentili. He says:

"But if spies are severely dealt with it is because of the greater dangers incurred from them for they are hidden enemies within our very vitals and they are frequently able by detecting a single design of the enemy to cause them more danger than a thousand companies of foot and a thousand cohorts of cavalry. It was necessary to guard against this evil by threatening a heavy punishment to those who caused it. Hence, the laws and penalties are made harsh for this reason and for others as well."¹⁹

The only other reason advanced by Gentili is that a spy breaks a compact. This compact may be said to be broken by the use of deceit. The publicists abhorred deceit.

The publicists in dealing with the subject of the use of secret agents for gathering intelligence, distinguished between spies and traitors. In the words of Ayala: "Those who carry secret intel i-

gence to the enemy are reckoned traitors and visited with capital punishments"²⁰. Spies were those secret agents who were sent by the enemy. Those of his subjects who gave secret intelligence to the enemy were traitors. They were in breach of allegiance to their sovereign. This disloyalty was treason and hence they could be punished as common criminals.

Like in the case of spies, the publicists were of the view that a belligerent could exploit the treason of enemy subjects in war. They argued that a belligerent could guard against such a practice. It was not like the sending of assassins or the poisoning of the enemy's water or food, both of which were difficult to guard against. These latter activities were perfidious and therefore illegitimate²¹. While admitting that the treason of enemy subject could legitimately be used in war, they maintained that it was not honourable and should not be resorted to except in cases of extreme necessity or in the prosecution of the most just causes.²²

Traitors once caught had to be punished. In the first place, as a measure of deterrence against future traitors, secondly, as a means of self defence against their activities, thirdly, and significantly, because of the criminality of their disloyalty to their sovereign.

In conclusion, it may be said that the wartime intelligence gathering activities, with which the early publicists concerned themselves, were espionage and treason. The activities involved were not different in nature. In both, use was made of secret agents in

gathering intelligence, in a clandestine manner. The only distinguishing factor was found in the element of allegiance. Spies owed no allegiance. Traitors owed allegiance and were in breach of that allegiance. Both spies and traitors were punished once caught by the belligerent that they offended. International Law permitted the use of both spies and traitors, but in the same breath permitted their punishment as a measure of self defence and deterrence in the case of spies and for criminal breach of allegiance as well, for traitors. The views of the early publicists provided the foundation of the law as it stands today.

2:2:2 Reflections Upon The Position Taken By The Early Publicists

The Publicists conceived intelligence gathering activities as wartime activities. They did not consider the question of intelligence gathering activities in peace. Yet the history of the period shows several incidents of intelligence gathering activities which strained the relations between nations.²³ The most famous of the incidents was the Mendoza affair²⁴. Mendoza, the Spanish Ambassador to England, started a spy ring in England involving several high ranking English subjects. They volunteered to serve his Hispanic Catholic Majesty Phillip II by providing him with information about England. When Mendoza's activities were discovered, the English court and Government were undecided on what to do. Gentili was contacted at Oxford and he advised that the ambassador was inviolable. He could not be executed as a spy. He could only be declared a persona non grata. Mendoza was expelled. For centuries now it has become a rule

of diplomatic practice that when a diplomat engages himself in activities inconsistent with his position, he is declared persona non grata and can only be expelled.

The Mendoza affair is more widely known for the questions it raised with respect to diplomatic protocol. The aspect of gathering intelligence has been largely ignored. The reason why the searching pens of publicists never mentioned intelligence gathering activities in peace can probably be found in the sense of honour of the time. Espionage and other intelligence gathering activities were looked upon with disdain. These activities were dishonourable business. To use that over-used cliché, "a cloak and dagger" activity. It would not be heard of that princes who were not at war were involved in such dishonourable business against each other. This so-called sense of honour for a long time condemned peacetime intelligence gathering activities to international comity rather than law, and to non-cognisance by International Law.

Returning to what the publicists wrote about wartime espionage, in order to understand the position given to the spy under the Laws of War, an understanding of the nature of the 18th Century War and its conduct, as well as the armies that fought it, is necessary.

The 18th Century War and the wars before it were open duels between professional armies. As an open duel, deception of any kind was despised. Clad in their colourful uniforms, the small professional armies respected a manly code of conduct. A victory earned in open

battle was more praised than the one earned by the use of ruses or stratagems of war. This manly code is reflected in the works of the publicists. Vattel is a particular proponent of openness and despises any tricks whatsoever²⁵. In so doing, some of the publicists set a very high standard of openness.

For these reasons, a spy and a traitor who employed methods of deceit to achieve their purpose were given an unprivileged position. Although espionage and treason were permitted when practised by nations as a means of obtaining information about the enemy, at the same time, because spies and traitors as individuals employed deceit, thereby infringing the unwritten code of conduct of the soldiery of the day, they could be punished.

Against this background of heavy punishment prescribed for spies and traitors, was the general wartime humanitarian climate of the era of enlightenment²⁶. In that era, war became more civilized between European nations. The harshness of war was mitigated by the laying down of customary rules of war relating to sieges, bombardments, quarter, and manoeuvre. In their battles, in the bombardment of fortresses and in laying sieges against cities, the armies took the greatest care to see that unnecessary losses were avoided among the soldiers and that the civilian population was spared. In the sphere of war these were the fruits of enlightenment for Europe. In the 19th Century, these fruits were abandoned in favour of doctrines of total war. Carl von Clausewitz, the 19th Century Prussian philosopher of war, one of those most responsible for the popularity of doctrines of

total war, thought that the fighting habits of the enlightenment were contrary to the true essence of war. He wrote:

"Not only in its nature but also in its aims [the 18th Century] war became increasingly limited to the fighting force itself . . . All Europe rejoiced at this development. It was seen as the outcome of enlightenment. This was a misconception, enlightenment can never lead to an inconsistency; as we have said before. It can never lead two to equal five. Nevertheless, this development benefited the people of Europe . . ."27

Whereas the people of Europe as a whole and the ordinary soldiery in particular, benefited from the humanitarian climate of the enlightenment the spy and the traitor did not. They operated contrary to the code of conduct of the armies. Technically and ethically, they remained outside these armies and could not receive part of the package of humanity that was due to the soldiery. Since they carried out war-like activities, they also did not receive what was due to the civilian.

The Enlightenment, as an age coming after the Renaissance, and the publicists in particular, were greatly influenced by Christian ethics and Roman traditions. In both traditions, deceit in human conduct was very much abhorred. Deceit was outrageous if it involved a breach of trust or commitment. War has not always been fought on grounds of honesty. Tricks have always been used. The Christian philosophers and the publicists after them therefore justified certain types of trickery and discouraged others. Ruses and stratagems of war were regarded as legitimate wartime practices. St. Augustine, the greatest of the Christian philosophers, is quoted as saying:

"When one undertakes a righteous war, it makes no difference in respect to justness whether he fights openly or by ambuscades."²⁸

Intelligence gathering activities, particularly espionage, were justified as ruses of war. Moreover, it was argued that God Almighty, ordered Moses to commission spies into Canaan. However, in keeping with Roman traditions which emphasised martial ability in open combat and duels, the clandestine methods of the spy could not earn him the protected status of a soldier. Instead the spy earned the punishment of death for his activities.

Ruses of war and strategems were distinguished from perfidy²⁹. Perfidy was not allowed by the law of nations. Perfidious activities were those which involved a serious breach of trust between belligerents against which the belligerent could not guard. Activities, such as the use of poisoned weapons, poisoning food and water of the enemy, abuse of flags of truce, breaches of ceasefire and the killing of Parlementaires, were recognized as being perfidious. All these were acts which invited the confidence of the adversary in order to betray it. Espionage and other measures (intelligence gathering activities) instituted for the purpose of finding information about the adversary were distinguished from these perfidious activities.

In the light of the foregoing the works of the early publicists on espionage and treason can be seen to have been in tune with and representative of the material and philosophical currents of their times. It remains a question to be answered later in this thesis whether these views can still be justified in today's circumstances.

2:2:3

The Law In The Nineteenth and Twentieth Centuries

The bedrock of the International Law relating to intelligence gathering activities was laid by the early publicists before the 19th Century. In the 19th and 20th Centuries, there have been several developments upon this foundation.

In the Law of Armed Conflicts the law as laid down by the early publicists has continued to be accepted. This is especially true of the law relating to the activities of espionage and ordinary treason. The distinction has been maintained as a matter of law. States have municipal enactments punishing any clandestine service or aid to a foreign power in time of war. The law relating to espionage in time of armed conflict has been codified since the second half of the 19th Century. This codification shows an acceptance of the views of the publicists before the 19th Century³⁰.

Codification brought some innovations. New rules whose origins can be found in the conditions of the 19th Century and which are not mentioned by earlier publicists found expression in these codifications. The main rules of this category were those that require that spies may not be punished without a trial³¹. The other rule is that once a spy has returned to the army to which he belongs, he cannot subsequently, upon capture be tried and punished for his previous acts of espionage; he should instead be treated as a prisoner of war³². These rules increased the protective humanitarian guarantees afforded to spies in war. These guarantees have now been extended to all

classes of unprivileged combatants in times of armed conflicts, including traitors.

As a result of the elaboration of the concept of wartime espionage in the codes, there were certain activities which did not fit into the concept. One of these was where the forces of a belligerent in uniform, without employing any clandestine method, gathered intelligence about the enemy forces. This activity came to be known as military reconnaissance. Unlike espionage, participants in this activity were privileged combatants, who upon capture became prisoners of war³³.

A main development in the field of intelligence gathering activities in time of war was that of the concept of war treason. Its origins have been subject to hot intellectual disputation³⁴. The concept was first elaborated by Dr. Lieber in the 1863 American Instructions³⁵. It has subsequently been accepted by international lawyers³⁶. At first, it related to civilians in occupied territory who aided in any way the troops of the belligerent whose territory had been occupied or its allies. The civilian population was bound to obey the belligerent occupant on the basis of its physical control of the territory³⁷. Intelligence gathering activities were of course a violation of this obedience and were regarded as war treason. The concept coincided with the era of total national wars. Not only professional armies but also entire belligerent populations were involved. Since total national wars have persisted into the 20th Century, so has the doctrine of war treason.

The codification of the law relating to espionage meant that technicality was bound to emerge with its interpretation. In the first place, many of the activities of intelligence gathering escaped the specific treaty concept of espionage. This was so especially where these activities were not regarded as being clandestine or upon false pretences. These acts are now regarded as war treason³⁸.

There is an important development in the law of peace. A corpus of law relating to peacetime intelligence gathering activities is emerging. This is the result of increased activity of nations in the fields of peacetime intelligence gathering. Nations have deployed the traditional methods of espionage to uncover vital secret information from other nations. In addition to these methods, new methods have been developed. Developments in science and high technology, especially of extra-sensitive photography, and eavesdropping from vast distances, have aided the intelligence gathering process. These techniques have become the main intelligence sources for the developed countries. Nations have also intensified the search for, and polished the analysis of information from open sources. These developments have led to the evolution of the concepts of peacetime reconnaissance and peacetime espionage.

At the same time, International Law has been developing towards the protection of all persons and granting them basic human rights. The International Law of human rights, which is a development of this century, has ensured against the abuse of power by states, and obliged them to guarantee certain standards of conduct to all humans. These developments have benefited all, including participants in peacetime

intelligence gathering activities.

2:3:0

A Summary of This Chapter

In its long history, intelligence gathering activity has been an important factor in inter-state relations. Being such an important factor, these activities have not escaped the attention of International Law. The International Law relating to intelligence gathering activities has been developing since the writings of the early publicists. They laid the foundations of the law of today. In accord with the material and philosophical circumstances of their time, they concerned themselves only with the wartime activities of treason and espionage.

The development of new doctrines such as war treason, due to military and legal developments and of the protection of those involved in these activities in the 19th and 20th Centuries, is but a testament of the dynamic character of International Law.

While notions of morality had prevented the growth of International Law relating to peacetime intelligence gathering activities in the past, the notoriety of these activities has led to the development of such law in contemporary times.

The result of all these developments has been the emergence of a near-complete corpus of International Law relating to these activities, with humanitarian guarantees and protection for those involved, the subject of investigation in subsequent chapters.

FOOTNOTES

1. Encyclopaedia Britannica, (London, 1961) Vol. 8, p. 712
2. Old Testament, The Book of Numbers, Chapter 13
3. Encyclopaedia Britannica, (London, 1977) Vol. 9, p. 681
4. Ibid. at p. 681.
5. Fitz-Gibbon C., Secret Intelligence in the Twentieth Century, (London, Hart, Davis, McGibbon, 1976) pp. 43-44. Also in Deacon R. The Silent War - A History of Western Naval Intelligences. (London, David and Charles, 1976,) pp. 9-10
6. See Oppenheim) L. International Law - A Treatise Vol. 1 (London, Longmans, 1952, Eighth Edition by Sir. H. Lauterpacht), p. 791 (where he catalogues incidents involving espionage and conspiracy by foreign diplomats in England, such as Mendoza the Spanish Ambassador in 1854, L' Aubespine the French Ambassador in 1587, and De Bass the French Ambassador in 1654).
7. Paine L. Double Jeopardy (London, Robert Hale, 1978) p. 21
8. Encyclopaedia Britannica 1977 op.cit. Vol. 9, at p. 681
9. Paine op.cit. p. 149
10. Wolseley, The Soldiers Pocket Book, 2nd Edition 1871 at p. 81. Quoted in Oppenheim "War Treason" (1917) 33 L.Q.R. p. 269
11. Encyclopaedia Britannica 1977 op.cit. Vol. 9, p. 681
12. These works have been listed down in footnote 13 of Chapter I Supra
13. Vattel: The Law of Nations or Principles of Natural Law, Edition of 1758 (Translated by G. Fenwick, New York, Oceana Publications, 1964, reprint) p. 299
14. Jus Gentium Methodo Scientifica Pertractatum. (Translated by J. H. Drake in 1934, New York, Oceana, 1964, Reprint) p. 452
15. Gentili: De Jure Belli Libri Tres, Edition of 1612 (Translated by C. Rolfe, New York, Oceana 1964, reprint) pp. 174-175
16. Grotius: De Jure Belli ac Pacis Libri Tres Edition of 1646 (translation of 1925 by F. Kelsey; New York, Oceana, 1964, reprint) pp. 654-655
17. Wolf op.cit. pp. 452-453

18. Bynkershoek: Quaestionum Juris Publici Libri Duo, Edition of 1737 (Translation of 1930 by T. Frank) New York, Oceana, 1964 (Reprint) p. 219

19. Gentili op. cit. p. 174.

20. Ayala: De Jure et officis Bellicis et Disciplina Militari Libri III, Edition of 1581 (Translation J.P. Bate in 1912) New York, Oceana 1964 (reprint) p. 219.

21. Gentili op. cit. p. 175, Vattel op. cit. p. 300.

22. Vattel op. cit. pp. 300-301.

23. Supra note 6.

24. Gentili op. cit.; Introduction (by Coleman Phillipson) p. 13(a).

25. Vattel op. cit. pp. 296-298.

26. See Best G. Humanity in Warfare (London, Weidenfeld and Nicolson 1980) Chapter I.

27. Carl Von Clausewitz; On War as quoted in Best G. Ibid at p. 31.

28. Legnano: De Bello, De Reprisalis et De Duello. (Translated by T.E. Holland in 1917, New York, Oceana, 1964 reprint) p. 271.

29. Vattel op. cit. pp. 296-301. Also Gentili op. cit. Book 2, Chapters III to XIV.

30. See the Brussels Declaration of 1874 articles 14, 19-22 Oxford Manual on the Law of War on Land. articles 23-26. The Hague Regulations of 1907, articles 29-31.

31. Article 30 of The Hague Regulations 1907.

32. Article 31 of The Hague Regulations 1907.

33. Article 29 of The Hague Regulations 1907.

34. Witness the debate between Professors Morgan and Oppenheim Supra Chapter I.

35. Articles 89-104.

36. See Baxter in (1950) Vol. 27 BYIL 235.

37. Oppenheim in (1917) Vol. 33 L.Q.R 363.

38. Infra Chapter 3.

CHAPTER THREE

CONTEMPORARY LEGAL CONCEPTS IN INTELLIGENCE GATHERING ACTIVITIES3:1:0 INTELLIGENCE GATHERING ACTIVITIES IN ARMED CONFLICTS

In the last chapter, it was clearly noted that intelligence gathering activities in times of armed conflicts have developed into the four distinct concepts of "espionage", "ordinary treason", "war treason" and "military reconnaissance". These concepts are distinguished and their characteristics are identified in the pages that follow.

3:1:1 Wartime Espionage: The Law of Armed Conflicts has no authoritative definition of the term espionage. The various treaties and writings of publicists instead define a spy. From the definitions (of a spy) given, the nature and characteristics of the activity "espionage" may be found. The most widely accepted definition of a spy is laid down by the Hague Regulations of 1907¹. This general acceptance of the definition has transformed it into one of International Customary Law. The definition in the Hague Regulations is supported by the teaching of publicists and has been elaborated by decisions of Municipal and International Tribunals. The 1977 First Geneva Protocol, in addition to the Geneva Conventions² has provided another definition. All these definitions will be examined in this chapter.

Article 29 of the Hague Regulations provides in part that:

"A person can only be considered a spy when acting clandestinely or on false pretences he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party."³

The first problem raised by this definition is who is "a person" under article 29. This problem must be resolved because the laws of war recognize a distinction between spies, traitors and war traitors on the basis of allegiance and a duty of obedience respectively. This distinction antedates the codification of the Laws of War.

In the Dutch Case of Re Flesche⁴ the special court of cassation was seised of this question. It held that provided other requirements of Article 29 were fulfilled:

". . . any one can be a spy . . . whether a soldier or civilian, whether male or female, whatever his or her nationality and whether he or she acts on orders or on his or her own initiative."⁵

Oppenheim in his treatise supports some aspects of this view. He wrote:

"No regard however, is paid to the status, rank, position or motive of a spy. He may be a soldier or a civilian, an officer or a private. He may be following instructions of superiors or acting on his own initiative for patriotic motives".⁶

The words of Oppenheim and those of the Dutch court of Cassation differ in one material respect. Whereas the court regards the

nationality of the person involved as of no consequence to the status of a spy, Oppenheim says nothing.

It is here submitted that the court's view that the nationality of a person is of no consequence to his status as a spy, has no support in International Law. It contradicts the development of International Law in this area. Since the earliest publicists of International Law has always recognized that where there was the bond of allegiance, the person was a traitor and not a spy. Since there is nothing in the Hague Regulations or in previous and subsequent International Instruments on the Laws of War to indicate that this age-old distinction was abandoned, it may be asserted that it is still valid.

It may, therefore, be said that a person under Article 29 can be anyone, soldier or civilian, male or female, whether he or she acts on orders or out of patriotic motives, on his own initiative, provided he is not a subject of the state he is acting against, and he fulfills all the other requirements of Article 29.

Under Article 29, a person will only be considered a spy when he is "acting clandestinely or on false pretences". This requirement is further emphasised by the second paragraph of Article 29. It provides that soldiers who have penetrated into the zone of operations of the hostile army when in the uniform of their armed forces, for the purpose of obtaining information, are not to be considered spies. The third paragraph further provides that civilians and soldiers who carry out their missions openly are not to be considered spies. The same

applies to dispatch bearers and all persons involved in maintaining communications between different parts of an army or territory.

Indeed the requirement that a person is a spy, if in gathering information he acts clandestinely or on false pretences, is the basic characteristic of espionage⁷. This clandestine character is achieved when a soldier divests himself of his uniform. Uniform, under the law of War, is a basic ingredient in determining the status of a combatant. A person will not be entitled to the ordinary privileges of a combatant if he does not prosecute warlike activities clad in the uniform of his armed forces⁸.

The case of Re Wuistaz⁹ shows how essential clandestinity or false pretences are to the concept of espionage in the Laws of Armed Conflict. Wuistaz was a Swiss national. During the Second World War, he denounced some members of the French Resistance to the Germans in occupied France. Before that Wuistaz had enlisted in the German Para-military Force. In the course of his activities against the Resistance, he wore the uniform of the Para-military Force. After the war, he was arrested and charged with espionage on account of his having denounced members of the French Resistance. The Criminal Division of the French Court of Cassation held that on the facts Wuistaz could not be convicted of espionage. He had not acted on false pretences. In denouncing the Resistance fighters he had been in uniform of the Para-military Force in which he was enlisted.

Not all manner of effecting disguise or clandestinity and false pretences is permitted by the Laws of Armed Conflict. The Laws of

War in particular prohibit all disguises which may be perfidious and are therefore war crimes. The Laws of War prohibit the use of the uniforms or insignia of the enemy army as a means of deception. The Law also prohibits the use of protected signs and emblems including flags of truce, the emblems of the Red Cross and the United Nations. These protected emblems may not even be used against the enemy for purposes of espionage¹⁰.

Article 29 requires further that the clandestine activity should be directed at obtaining information. In this way the activity is distinguished from other clandestine activities such as sabotage whose aim is to destroy the lines of the belligerent enemy. These activities not only cause confusion to the belligerent but they may also demoralize his troops. Another clandestine activity is propaganda, whereby through the dissemination of information, a spirit of resistance may be instilled into populations of occupied territory or the troops and civilian population of the enemy may be demoralized.

Under Article 29, both attempts and accomplished acts to collect information constitute espionage. The provision provides that a spy is a person "who obtains or endeavours to obtain information".

The definition of a spy under Article 29 restricts his activities to "the zone of operations of a belligerent". The "zone of operations" is a concept which has come into prominence as a result of the provision in Article 29.¹¹

Customary International Law recognizes three concepts in relation to the territorial extent of war. These are the "region of war", "theatre of war" and "zone of operations". According to Oppenheim, "The Region of War is that part of the surface of the earth in which the belligerents may prepare and execute hostilities against each other."¹² The region of war includes all the territories of the belligerents and the High Seas where they may fight. It also includes the territories of their allies, their colonies and protectorates. Parts of the region of war may be placed out of it by neutralization.

The Theatre of war is, on the other hand, smaller than the region of war. It is that portion of the region of war where the belligerents actually fight. All places in the region of war may be made theatres of war if actual hostilities are prosecuted therein. Oppenheim cites the good example of the Anglo-Boer War of 1899-1902 to distinguish both concepts. In legal terms the entire British Empire and all the High Seas were a region of war. The theatre of war was in South Africa where the fighting took place. During the World Wars, the region of war was co-extensive with the theatre of war. The war was fought everywhere on the globe, although it is doubtful whether the Americas were part of the theatre of war, as no serious actions took place there.

Under the customary laws of war, the zone of operations has even been confined to a much narrower area than the theatre of war. The zone of operations is the actual locality where the fighting is taking place between the belligerent forces. Under this definition even occupied territory is outside the zone of operations.

Following these customary demarcations it would follow that espionage as an activity in wartime is confined to a very small area. Since the most vital information required to win a war today is found beyond the battlefield, in the munition factories, the movement of troops to the battlefields, the number and stationing of aircraft beyond the battlefield as well as the morale of the civilian population, espionage would be reduced to a useless concept if these customary demarcations were religiously followed.

In the contemporary world, air power and immense ground fire-power in the form of aircraft, missiles, rockets, and long-range artillery have considerably blurred the old 18th and 19th Century concepts of battlefield. It is therefore very difficult to delimit the actual locality of combat between the belligerent forces. Entire territories of the belligerents are more often within their fire power and therefore the contemporary battlefield extends to the entire territory of the belligerents. If this is true of the battlefield, it is also true of the zone of operations of the belligerents. Practice and capability of nations has therefore rendered the old concepts of region of war, theatre of war and zone of operations obsolete.

In the 20th Century, there have been two tendencies with regard to the concept of zone of operations under article 29 of The Hague Regulations. One tendency has been to uphold the old concept, while the other has been to extend that concept, in view of contemporary developments in the art of war. In the case of Pablo Wabeski,¹³ the American authorities were not inclined to prosecute the accused for

espionage unless it was proved that he had entered a military installation or crossed the fighting lines or field of operations of the U.S. army. This case was an example of the re-affirmation of the old concepts.

In most cases, municipal tribunals have shown the tendency to widen the concept of zone of operations in order to cope with contemporary situations. In the case of U.S. ex Rel Wessels V McDonald, Commander of Brooklyn Yard¹⁴ Wessels was a German citizen. During World War I, he entered the U.S. on a forged Swiss passport under an assumed name. His mission was to gather information about the war capability of the country. He was arrested in the U.S. and charged with conspiracy to commit espionage. The charge was not pursued in the courts of law. He was instead detained as an alien enemy. In 1920, he was re-arrested and court martial proceedings were instituted against him for his espionage activities. He petitioned the Supreme Court on several grounds, especially against being tried by Military Tribunal. One of his grounds was that he would not have acted as a spy in New York where he was arrested. He argued that at the time of his arrest the city was not under martial law and it was not even in the theatre of warfare. He therefore asserted his right to be tried by an ordinary court of law. The court held that it was proper that Wessels be tried by a Military Tribunal as a spy. New York, the court said, was in the field of active operations of the war in the particular conditions of World War I. New York had been the centre of the U.S. war effort in dispatching troops and munitions to Europe. Moreover, it was not out of reach of German submarines off the coast. The

court said: "with the progress made in obtaining ways and means of devastation and destruction, the territory of the U.S. was certainly in the field of active operations."¹⁵

A liberal view of the lines of communications of a belligerent was taken by the Supreme Court of the U.S. in the case of Coleupagh V. Looney¹⁶. In that case, German-trained saboteurs had landed on the U.S. coast and proceeded into the country where they were apprehended by the FBI and tried by the Military Tribunal. A U.S. citizen petitioned the Supreme Court against his trial by a Military Tribunal as a spy. He argued that as a U.S. citizen he was entitled under the constitution to be tried by the ordinary courts. He also argued that since he had not passed through the lines of communication of the U.S., he could not be treated as a spy. It was held that persons who were involved in acts of "unlawful belligerency" could be tried by Military Tribunals if the President so ordered whether they were U.S. citizens or not. The court went on to say that in the circumstances the prisoner had passed through the U.S. lines of communications and was therefore a spy. The court said:"

"To say that a landing on our shores in time of war from enemy submarines was not passing through our naval and military lines, is to say that our coastal waters and shores at the point of entry were undefended, an assumption directly contrary to the agreed facts."¹⁷

Like in the case of ex Rel Wesels, the case of Coleupagh V Looney, extends the actual area of combat beyond the traditional confines of the zone of operations. This extension does, of course, violate the old concepts and introduces uncertainty into settled con-

cepts. This uncertainty should be resolved in favour of new opinions represented by these cases. In modern conditions of long range fighter-aircraft and intercontinental missiles, the co-extension of the zone of operations and the region of war is inevitable and reasonable. Old concepts which were tailored to fit the age of infantry and cavalry and the short-range cannon are irrelevant in the contemporary world.

Whereas in the past, especially before World War I, the most valuable intelligence for purposes of wartime victory was gathered on the battlefield, today the same is not true. The principal intelligence that was sought related to the number of the enemy, the deployment of the enemy forces, the nature of their weapons and the lines of communication that brought them supplies. This narrow range of intelligence sought, placed intelligence activities within a narrow geographic confine. This justifies the 1907 Hague Regulations approach to the problem of espionage.

In today's total war, the objectives of intelligence gathering in wartime are wider, and therefore, cover a wider geographical extent. The entire economic, political, social and military conditions of the belligerent nation are legitimate intelligence objectives of the other belligerent. The activities of searching for this intelligence are certainly carried out far beyond the actual battlefields. This is a point vindicated by the practice of nations in both World Wars. In these circumstances, therefore, it is only legitimate to conceive of a zone of operations which co-extends with the region of war.

Under Article 29 of the Hague Regulations, it is essential that the information gathered in the zone of operations is intended to be communicated to the hostile party. The requirements of the intention to communicate the information provides the requisite mental element (*mens rea*) for the activity of espionage.

Lastly, under the Hague Regulations, espionage is only committed when the spy is caught in the act. The capture of the person should be before he has returned to the forces to which he belongs. This is provided for in Articles 30 and 31 of the Regulations, and is supported by the works of the leading publicists.¹⁸

To conclude this section, a summary of the elements of the concept of espionage, under the Laws of War, may be made. In the first place, that espionage is an activity carried on by spies. A spy may be male or female, civilian or soldier. He may be a citizen or national of the belligerent state, or of a third state, but not of the state against which he works. A spy gathers information about the situation of a belligerent with the intention to communicate it to the hostile party. In carrying out the activity of gathering information, the spy acts clandestinely or on false pretences, and must not be in uniform of his armed forces. The activities of spies are carried out within the zone of operations of the belligerents, which in modern conditions is co-extensive with his entire territory and the region of war. Lastly, a spy may only be held accountable for his activities if he is apprehended in the act.

3:1:2 The Concept of Espionage in International Armed Conflicts Under The Geneva Conventions of 1949 and The 1977 Additional Protocol I

Although the Geneva Conventions of 1949, on more than one occasion mention spies,¹⁹ nowhere do they attempt to define espionage. The natural presumption is then that the Conventions accepted the existing concept of espionage. Indeed, an authoritative commentary to the fourth Convention expressly states that the definition given in the Hague Regulations is still valid.²⁰

The Conventions created one notable development relating to the International Law governing espionage. Article 2, common to the Conventions, provides that the rules laid down in those Conventions apply in all situations of international armed conflicts, including war. Since the concept of espionage in the Hague Regulations was accepted by implication into the Conventions, it may, therefore, be correctly asserted that this same concept applies to all armed conflicts of an international character.

The extension of the concept of espionage to international armed conflicts has been further amplified by Protocol I of 1977. In Article 46, the Protocol attempts to clarify when a member of the armed forces of a party to an armed conflict may be considered a spy. That provision emphasises that such a member of the armed forces shall be regarded as a spy if he is engaged in espionage.²¹ He will be considered as engaging in espionage if he gathers information when he is not in the uniform of the armed forces to which he belongs.²² In

gathering information, the provision emphasises that he must do so either in a clandestine manner or on false pretences.²³ A member of the armed forces who having completed any such acts returns to the armed forces to which he belongs cannot subsequently upon capture be treated as a spy on the basis of those acts.²⁴

The provisions of Article 46 of Protocol I reiterate the provisions of the Hague Regulations of 1907. The Protocol expressly extends the rules relating to wartime espionage to all cases of international armed conflicts. There are, however, some differences between Article 46 of Protocol I and the rules laid down in the Hague Regulations.

The first of these differences relates to the personal scope of the rules. Article 46 is limited to members of the armed forces. It is intended to determine when members of the armed forces of a belligerent may be treated as spies. On the other hand, the rules in the Hague Regulations are not likewise limited. Under Protocol I, the concept of armed forces of a belligerent is given in Article 43. The armed forces include all organized armed forces, groups, and units which are under a command responsible to the party for the conduct of its subordinates, even if that party is represented by a government or an authority not recognized by the adverse party. Members of the armed forces should be subject to an internal disciplinary system which has among other duties to enforce compliance with the rules of International Law applicable in armed conflict. The provision also permits a party to the conflict to incorporate a paramilitary or armed law enforcement agency into its armed forces provided that the other parties to the conflicts are informed.

Unlike the Hague Regulations, the Protocol does not limit the territorial area in which the activity of espionage may be carried out. This brings us to question the validity of the old concept of zone of operations as the territorial confine in which espionage is carried out. A submission here is made that the Protocol does not affect this territorial area in which espionage may be carried out. The preparatory works and the wording of the provision show that the concern of the drafters of the provision was to clarify when members of armed forces could be regarded as spies but not to destroy other rules relating to the activity. While the Protocol did not modify or destroy the need for espionage to be committed within the zone of operations of a belligerent, practice has so extended the zone of operations that it co-extends with what was previously regarded as the region of war.

It may be said that the concept of espionage laid down in the Hague Regulations has been extended by the Geneva Conventions and the Protocol to all International Armed Conflicts. While the Protocol has not yet been very widely ratified by states, it may be argued that the re-affirmation of the concept of espionage laid down in the Hague Regulations of 1907 by all states present at the Geneva Conference affirmatively re-asserts the continued validity of that concept. The Protocols are also significant for extending the concept of espionage in a more positive manner beyond the confines of the restricted concepts of war into the wider sphere of armed conflicts.

3:1:3

Ordinary Treason or Intelligence With The Enemy

Allen W. Dulles, a former Director of the CIA, has written:

"If an Intelligence Service wants to do more than count the number of the enemy and his cannon . . . if it wants to find out what the enemy commanders are planning . . . It must do more than hide in the bushes and look over the fence or even look from high flying planes or satellites. It has to get inside the enemy's headquarters and listen to his conversations. It must steal important plans."²⁶

It is a very difficult task to penetrate an intelligence objective and obtain useful intelligence. The task is particularly onerous for a foreigner. However well disguised a foreigner is and however much resemblance he has with the local population, it is difficult in today's circumstances of effective counter-espionage and all-round physical security measures, for such a person to obtain vital information from the objective, let alone enter the objective.

In order to secure vital intelligence from such an objective, states have in all ages used persons who are employed within these objectives or already have good access to the required information. These persons, in most cases, are nationals of the target state from which information is sought. These persons have always been induced to serve the foreign power as a result of three incentives. The first is where a person is promised a monetary reward in return for his services. The second is where a person shares the ideology of the foreign power and therefore, in furnishing the required information, believes he is furthering an ideological cause. The third inducement is in the form of recruitment upon a dependent base. The most common

form of this is the use of blackmail upon such persons to provide the information under their custody.

Modern textbooks on International Law say nothing of ordinary treason or intelligence with the enemy. This tendency may be explained by the fact that until fairly recently International Law was reluctant to interfere in the relations between a subject and his sovereign. The treatment of a citizen by his government was therefore largely left in the hands of the municipal legal system. In spite of these tendencies, early writings on International Law show that the concept of ordinary treason in wartime was well known.²⁷

Under customary International Law, if the citizens of a state were found communicating valuable information they were said to be guilty of treason for carrying intelligence to the enemy. This activity was distinguished from espionage on the basis of allegiance. In espionage, the individual involved was a foreigner sent into the target state to gather information. A traitor was a person, who, while owing allegiance to the target state, nevertheless went ahead to betray its secrets to the enemy state in time of war. This breach of allegiance was known as adhering to the enemies of the sovereign or giving them aid and comfort under municipal law.²⁸

The definition in the Hague Regulations makes no mention of nationality. The Regulations do not say whether the nationality of the actor is an important criterion of his status as a spy. They do not rule out that possibility either. The Regulations, as a codifi-

cation of the customs and usages of war, cannot be construed as having had the effect of eroding or extinguishing that criterion, unless it was expressly stated, or the entire construction of the document as a whole would have that effect. The construction of the Hague Regulations as a whole, and the provisions relating to espionage in particular, show no intention to do away with the existing criterion of nationality.

There have been instances when courts of law have been of the view that the nationality of the spy is irrelevant.²⁹ There have also been instances when the citizens of a state have been tried by military tribunals as spies with the sanction of the ordinary courts of law because they have worked against their own states in time of war.³⁰ These are weighty authorities pronounced upon by courts of high authority. Nevertheless, in so far as these authorities controvert rules of International Law, they cannot escape adverse criticism. Nationality remains the watershed between espionage and ordinary treason in war in matters of gathering intelligence.

In summary, treason is that activity of gathering intelligence carried out by nationals of a belligerent state to benefit an enemy power in time of war. The basis of this treason is the breach of allegiance to his state committed by the national by giving aid and comfort to the enemy.

3:1:4

War Treason

The origins of the doctrine of war treason can be found in the conditions of the 19th Century. It arose at the time of total nationalist wars and the rise of the legal concept of belligerent occupation in the place of that of conquest. Before going into the actual content of the concept of war treason, it is necessary to trace its origins.

The 19th Century war changed character from that of previous times. In the past, wars had been public affairs between Kings. They were contests between Kings prosecuted by their duly authorized agents, their small professional armies. The enlightenment had also tried to confine the effects of war to these armies. The population, more often than not, did not understand the cause for which those wars were being fought. They did not even care about the wars.³¹ The French Revolution changed all that. It ushered into Europe the national war, which was a popular war of the whole nation fought by the whole people, to achieve national as opposed to a King's objectives.

It was the French Revolutionaries who began it all. In 1793, the French nation stood surrounded by hostile absolutist monarchies. Their revolution and newly won liberties were all at stake. The absolutist monarchies, led by Austria, sought to reverse them and restore the rule by divine right in France. The revolutionaries then called the entire French nation to arms to defend their revolutionary

gains. By 1797, this mass involvement of the French nation had paid dividends. Austria had been defeated and with the peace of Campo Formio, the revolution in France had been secured. The war had now been pushed into foreign lands. The French armies, with their revolutionary slogans of "equality, liberty and fraternity", formed an alliance with other European middle classes and peasantry. These allies supplied the French with the necessary Intelligence, food and other wartime provisions. Not all European civilian populations supported the invading French armies. Some posed formidable resistance against them. In Spain, Portugal and Naples, the peasants, in the name of God and in the service of the King, rebelled against the French. By the use of guerrilla tactics, they held up or destroyed French armies. In Russia, the peasant Mujiks did the same in the winter of 1812. These brave acts of peasants were the beginning of the defeat of Napoleon.

The civilian population then ceased to be the innocent spectators in the contest between Kings and between professional armies. They became active participants. This gave rise to the war of all citizens. The question became how the belligerent was to accord the civilian population the traditional respect due to it and at the same time protect himself from their hostile activities which were intended to favour the other party to the conflict. The birth of the concept of war treason was the solution to these problems.

The concept of war treason was given greater impetus by the decline of the legal state of conquest and its displacement by the new

concept of belligerent occupation as between European powers in the 19th Century. Before the 19th Century, whenever, during war, territory fell into the hands of a hostile belligerent, it automatically went under his authority by right of conquest. The conqueror could, therefore, make law for that territory and the population therein owed him allegiance as their sovereign. If persons in such a territory committed acts of subversion to favour their former sovereign and against the conqueror, they were subjected to the ordinary law of treason. Since the 19th Century, acquisition of territory by conquest has been losing ground (except in the acquisition of colonies outside Europe at the end of the 19th Century). In the 19th Century, jurists argued that no acquisition of territory was complete until the end of a war and the transfer of territory between the belligerents had been secured by a peace treaty.³² In the period when the forces of the belligerent occupy territory and before a transfer has been effected by treaty, a different legal regime applies. This is the period of belligerent occupation.³³

The activities of persons in occupied territory against the belligerent occupant which were intended to favour their legitimate sovereign could not be brought under the law of ordinary treason. Treason is based on the nexus of allegiance between subject and sovereign. No such relationship existed here between the belligerent occupant and the population of the occupied territory. The authority of the belligerent occupant over the population was simply derived from his physical control of the territory by force of arms. If the population owed the belligerent occupant any duty, it was a duty of obedience based on this control but not allegiance.

War treason originally referred to activities of the civilian population of occupied territory, within that territory, which were intended to favour the hostile party and harm the occupant. Sabotage of lines of communications, secret and open communication with the enemy about the strength and condition of the occupant's troops, and guiding enemy troops were activities which were classed as war treason.³⁴ War rebellion, a situation where such populations took up arms openly to challenge the occupant, fell out of the concept of war treason.

The military conditions of the 20th Century have extended the compass of war treason beyond the occupied territories. Hostile activities have been committed by enemy civilian nationals in occupied territories and also in the territory of the belligerents. Soldiers not in the uniform of the armed forces to which they belong have also undertaken missions of sabotage. These activities have all been brought under the concept of war treason. In addition to these, there are activities of gathering information which fall outside the technical definition of espionage in war.

While the activity known as war treason has become widespread in this century, there has been no attempt to give an authoritative definition of the activity in any contemporary treaty. Some leading Publicists of the Century have however, attempted to define the activity. According to R.R. Baxter, war treason,

"... Involves the commission of hostile acts, except armed resistance and possibly espionage, by persons other than members of the armed forces properly identified as such. The concept is not peculiar to the Law of Belligerent occupation but may be committed

L. Oppenheim³⁶ insists that these acts of war treason should satisfy four essential characteristics.:

(1) The acts must be committed within the lines of the belligerents. This does not only mean the zone of operations or occupied territory. It could be anywhere within the territory of the belligerents. (2) The acts must be harmful to the belligerents. (3) The acts must be favourable to the enemy. (4) The perpetrator of the act must have the intention of favouring the enemy.

These wide definitions given by celebrated Publicists are indeed wide enough to cover all ways and means in which the belligerent's efforts may be hindered while favouring the enemy. Naturally the passing of valuable intelligence about the belligerent to the other party to the conflict is such a hostile activity. It may amount to war treason. In view of the concept of espionage in the Law of Armed Conflicts, it is necessary to determine when an act of passing valuable intelligence to the enemy becomes war treason. This is necessary to avoid an overlap in concepts. One learned commentator has written:

"The distinction between the two types of offences [war treason and espionage] is technical, based on the restricted definition of a spy laid down by the Hague Regulations. The two are in fact complementary, and many acts which escape the technical definition of a spy as laid down by the Hague Regulations fall into the category of war treason."³⁷

In view of the way the concept of espionage has been enlarged by interpretation in both the municipal and international tribunals, only very few activities of gathering intelligence may be classified as war treason today. These are activities of gathering intelligence which are carried out by civilians openly, without false pretences or clandestinity. Without resorting to clandestinity or false pretences, the civilian population is able to learn a lot about the army of the belligerent, its weapons and its numbers, especially. This information, if passed to the other party to the conflict, would indeed favour him, to the prejudice of the other belligerent or party to the conflict. Other activities of gathering information which belonged to the category of war treason, have now been incorporated into the activity of espionage, through the interpretation of Article 29 of the Hague Regulations by the courts. These include the gathering of intelligence by agents in the territory of the parties to an armed conflict, outside the zone of operations. Since in present conditions the zone of operations co-extends with the region of war, which includes all the territories of the parties to the conflict, this type of war treason has been submerged.³⁸

The concept of war treason in contemporary times also still covers hostile activities other than gathering intelligence which are collectively known as sabotage.³⁹ These activities lie beyond the compass of this thesis.

3:1:5

Military Reconnaissance in War

Wartime military reconnaissance activities are those carried out by ". . . soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army for the purpose of obtaining information . . ."40 These soldiers are not considered spies.

Military reconnaissance activities, in time of war, are also carried out by the use of instrumentalities of one belligerent in the territory of another. During wartime, the most used instrumentalities have been aircraft. They have been used to photograph the military forces of hostile powers and to locate hostile forces. While in the past manned aircraft were used for these purposes, today the tendency has been to use more and more robot aircraft.⁴¹ Besides aircraft, surface ships on the High Seas have also been used in reconnaissance activities, especially in the interception of oversea telecommunications.⁴²

Military reconnaissance is distinguished from espionage for lack of clandestinity. In espionage, clandestinity and false pretences are the principal trade marks of the activity. On the other hand in military reconnaissance, the participants act openly and as members of the belligerent forces. They seek information while wearing their uniform. The same is true of aircraft. Aircraft used are normally military aircraft. The fact that the combatants and the instrumentalities used are easily identified as those of the belligerent does not however mean that the combatants do not take measures to ensure the

secrecy and effectiveness of their mission. So long as the permissible ruses of war are used without effecting any clandestinity the activity will remain reconnaissance.⁴³

Military reconnaissance is also distinct from the activities of treason and war treason. Unlike the latter, the persons involved are soldiers properly identified as such, while unlike the former, no questions of breach of allegiance to the belligerent against whom they are operating arises.

3:1:6 Legal Concepts of Intelligence Gathering In Internal Armed Conflicts

Since 1949, there has been a marked attempt to extend the main principles of the Laws of War to all armed conflicts both international and internal. In the sphere of internal conflicts these spirited attempts are seen in Article 3 common to the four Geneva Conventions of 1949 and in Geneva Protocol II of 1977.

Whereas these legal instruments have extended to the participants in these conflicts general humanitarian protection, they have not attempted to make any elaborate definition of the many concepts which are carefully defined under the Laws of War. The laws of internal conflicts do not indeed define the various intelligence gathering activities. It is therefore safe to presume that since these codes offer no definition, the law of internal conflicts does not recognize these activities.

While this is the case in the present state of the law, intelligence is equally needed in both internal and international conflicts. It is hoped that since this law is just emerging, these concepts will be defined and the concepts in the Laws of War will be extended to these Internal Conflicts as well.

3:2:0 INTELLIGENCE GATHERING ACTIVITIES IN PEACETIME

Apart from diplomacy, which is outside the scope of this thesis, peacetime intelligence gathering activities may be divided into two legal concepts: espionage and reconnaissance. It is these concepts that are examined in this part of the chapter.

3:2:1 Peacetime Espionage

Due to the notoriety of the practice of sending spies in peacetime by states, a concept of peacetime espionage by states has evolved. Oppenheim has given a clear definition of peacetime spies which will be used as a launching pad for the examination of the concept of espionage in peacetime. He says:

"Spies are secret agents of a state who are sent abroad for the purpose of obtaining clandestinely information in regard to military and political secrets."⁴⁴

The definition emphasises that spies are secret agents of a state. As secret agents, they are distinguished from public agents of a state. Public agents of a state are those persons who are publicly acclaimed as the representatives of a state. Diplomats are public agents for the purpose of diplomatic representation of their states.

Spies, who are secret agents, are not publicly acclaimed as representatives of their states nor are they ever acknowledged by the states in which they work.

Spies are "sent abroad" according to Oppenheim. This emphasises the practice of sending the nationals of one state into another for purposes of gathering information. This practice of sending agents abroad, has largely fallen into disuse, because of the effectiveness of counter-espionage and physical security measures. It is increasingly more difficult for a foreigner to gain access to vital information by physically penetrating an objective and stealing the required information.⁴⁵ In peacetime, today like in wartime, the most important agents are increasingly those who are already in place in the objective where the information is sought. These persons are, in the majority of cases, the citizens of the state from which information is sought.⁴⁶

When a citizen betrays information in his country, or seeks information and supplies it, to a foreign power in time of peace, the law relating to treason cannot apply. In wartime, the law of treason applies because of the fact that the citizen gives aid and comfort to the enemy. In the Law of Peace, there is no enemy for there are no hostilities.⁴⁷ The traditional law of treason would, therefore, not apply. The concept of peacetime treason, based on the giving of information to a foreign power not an enemy, in the technical sense, is unknown to International Law.

Municipal practice shows the proliferation of laws intended to curb peacetime espionage. Both nationals and secret agents who are sent are equally treated as spies under these laws if they are involved in the clandestine supply of vital information to a foreign power.⁴⁸ It would, therefore, be unreasonable to confine the description of a spy to secret agents who are sent by other states in view of this unanimous practice of nations.

As an activity aiming at obtaining valuable information, peacetime espionage emphasises clandestinity. There are, of course, other clandestine activities carried on by states against other states in peace. Subversion and propaganda are examples of these activities.

The fact that information is sought clandestinely is important. Indeed it has been emphasised that this is the prime characteristic of the activity of espionage whether in peacetime or in wartime.⁴⁹ In this way, peacetime espionage is distinguished from other activities of gathering vital information in which secret and clandestine means are not used and instead they are carried on openly. These activities are known as peacetime reconnaissance.

Oppenheim confines the character of information sought to military and political secrets. In an age where all kinds of information are sought including political, military, economic, biographic and geographic, it would be unrealistic to confine the concept of espionage to the search for only two of the many categories of intelligence. Moreover, in the contemporary world, in which the search for

intelligence is dictated by the need to estimate the power of a foreign state, probability of the use of that power and the time the power may be used, none of these factors can be ignored. The factors interplay to determine the power of the state and how it may be used. The search for economic and scientific information has also assumed greater importance in recent years. The theft of high technology has assumed importance not only in the struggle between giant corporations, but also between states. For example: in 1971, Britain expelled 102 Soviet diplomats and in 1983, France expelled 46 Soviet diplomats, all accused of attempts to steal high technology secrets.⁵⁰

In contemporary times, both doctrine and state practice dictate the need for a clear definition of espionage. In the light of the foregoing discussion, a concept of peacetime espionage may be tendered. Peacetime espionage is the activity in which states use secret agents, irrespective of their nationality, to clandestinely procure vital information from other states.

3:2:2

Peacetime Reconnaissance

In times of peace, states rely on diplomatic channels to inform themselves about activities of other states. Espionage is occasionally resorted to by opposed powers in order to inform themselves of the secret warlike activities of rivals where diplomacy is deficient. The 20th Century Revolution in intelligence gathering has increased the means of gathering information available to states. The new

activities do not fit in the old concepts of espionage or diplomacy. The concept of peacetime reconnaissance has been born to cover these activities. As states continue on the path of local and multilateral jealousies, especially the cold war, peacetime reconnaissance activities have increased, opening new vistas of international interaction.

Reconnaissance in peacetime means all those activities of gathering intelligence other than espionage and diplomacy by one state in order to acquire intelligence about another state. Unlike espionage, reconnaissance activities are not based on clandestinity or false pretences. And unlike diplomacy, they are not an official means of intercourse between states for purposes of exchanging information.

In reconnoitring another state, a state aims at obtaining vital information. This information may be military, political, economic, geographic or biographic. The emphasis which has been placed on military information is uncalled-for.⁵¹ In a modern state, all this information interacts to determine the power of the state, the probability of its use and the location of that use - the basic aims of intelligence gathering.

In peacetime reconnaissance, states use both human agents and scientific instrumentalities. Reconnaissance agents and instrumentalities may be located (1) in either the territory or suprajacent airspace of the target state, or, (2) in, or on the adjacent High Seas and the airspace above them, or (3) on neighbouring territory, or (4) in the territory of the reconnoitring state, if it is not neighbouring

the target state, or, (5) in outer space.

3:2:2(a) Reconnaissance Within the Territory of the Target State

The territory of the target state includes its land territory, its territorial waters and the airspace suprajacent to its land territory and territorial waters. Within this territory, reconnaissance activities by other states have been conducted through the use of both agents and instrumentalities.

States frequently send human agents into the territories of other states to search for information. These agents may gain entry into the target states lawfully or unlawfully. These agents may gather information from overt sources, as well as from intermingling with the local population.

The use of instrumentalities in the search for vital intelligence has produced problems and led to confusion in the concepts of intelligence gathering in peacetime. The use of aircraft has been the most pronounced such activity. These activities have been carried out in the airspace of the target state's territory. Two types of aircraft seem to have so far been used, the military aircraft, specifically constructed for intelligence gathering, and civilian passenger aircraft, fitted with intelligence gathering equipment.

The most notorious use of military, specialist, intelligence gathering aircraft has been made by the U.S.A. Several states,

including the U.S.S.R, Vietnam, North Korea, Cuba and Nicaragua, have in the past 25 years complained of overflight by high flying U.S. aircraft whose intention was to photograph their defence facilities. The most famous of these incidents was the U-2 Incident of 1960.⁵²

On May 1, 1960, Soviet forces using a battery of rockets shot down a U.S. Lockheed U-2 type plane near Sverdlovsk, well inside Soviet territory. The high altitude, fast flying aircraft was shot down while flying at the altitude of about 60,000 to 68,000 feet. The purpose of the flight was to gather intelligence about the ground and air defences of the Soviet Union and its industrial-military complex. The pilot, Francis Gary Powers, a citizen of the U.S. bailed out of the plane and was captured by the Soviet authorities. Powers was eventually sentenced to ten years imprisonment by a Soviet Military Court under Article 2 of the Law on Criminal Responsibility for State Crimes. The Military Collegium found that Powers had used the plane to photograph military-industrial complexes, air defences, and missile sites. The court held that the information constituted a state secret of the U.S.S.R. which Powers had attempted to give to a foreign Power by carrying out the designs of the C.I.A.

The Soviet provision under which Powers was convicted for espionage was widely framed. This is like other provisions in the municipal laws of other states determining espionage. The width of these provisions covers almost all intelligence gathering activities. These municipal definitions go beyond the accepted concept of espionage in International Law. They do not stress the key elements of clandestine-

ity, or use of false pretences which are the hall-mark of espionage. Whereas Powers was properly convicted under the municipal law of the Soviet Union, it is submitted he cannot be regarded as a spy under International Law.

Powers was a reconnaissance agent rather than a spy. This view is based on the nature of the activity in which he was involved. The aircraft he used in gathering information belonged to the C.I.A. an official agency of the United States. Powers himself was an employee of the C.I.A., bearing an employee identity card of that agency. He carried out the duties prescribed for him by that agency. In addition, upon arrest, the U.S.A. acknowledged that he was an employee of the C.I.A., despatched by the agency to gather information, although the U.S.A. never protested his trial and subsequent imprisonment. In these circumstances, Powers was not an agent acting clandestinely or on false pretences. He was acting openly as an agent, carrying out a state duty.

The fact that Powers flew his plane at great heights not intending to be discovered cannot indicate the required clandestinity or false pretences for the activity of espionage. One author has argued correctly that he did not want to be identified by the Soviet defence forces. Even a military aviator on a reconnaissance mission in war, does not announce his mission beforehand. For not doing so he is never treated as a spy. He can undertake any amount of secrecy that makes his mission effective.⁵³ On these grounds, it would be reasonable to support those who have advanced the view that Powers was a reconnaissance agent rather than a spy.

This view was not taken by all jurists who considered the U-2 incident. In the debate following the incident, some eminent jurists joined the debate on the basis that Powers was a spy.⁵⁴ While this was the view of very eminent scholars, it was unfortunate because the case was one of reconnaissance. Besides, the jurists never considered the fact that espionage is basically an activity of human agents. By contrast, in the case of Powers, it was basically a case of the use of an instrumentality - the U-2 plane.

The use of civilian passenger planes, specially equipped with intelligence gathering equipment, presents even greater problems of concept. For several years now, civilian airliners have been accused of carrying out intelligence gathering activities. It has been alleged that these airliners are equipped with special photographing equipment which take photographs of the territory over which they fly. As a result of these allegations (which are yet to be proved) several civilian passenger planes have been shot down for transversing sensitive military installations.⁵⁵ The most recent of these incidents is the downing of a Korean airliner in September 1983, killing 269 people aboard by the Soviet Union. The plane crossed Soviet strategic installations on Sakhalin Island in the Soviet Far East.⁵⁶

Assuming that these civilian passenger planes are used in the gathering of intelligence as has been alleged, then the character of the activity must be determined. Naturally the fact that the plane hides its intelligence gathering character under the guise of an innocent civilian passenger plane amounts to a representation of false

facts to the world at large. This fact alone cannot make the activity of the passenger plane espionage. Espionage is an activity carried out by human agents who penetrate intelligence targets and acquire the required information. The use of the planes emphasises the use of the instrumentality rather than the agent and hence the distinction between the two activities. These activities are therefore properly classed as reconnaissance activities.

Other reconnaissance activities carried out within the territory of the target state include the placing of sneakies by agents of the reconnoitring state. Miles Copeland, a former C.I.A. official, has admitted that the C.I.A. has placed several of these gadgets on the territory of the U.S.S.R. and its allies to provide early warning system in case of nuclear attacks against the west.⁵⁷

3:2:2(b)

Reconnaissance From the High Seas

States have, in recent years, developed both surface ships and submarines for the purpose of gathering vital information.⁵⁸ These vessels are used to photograph the coastal defences of other states. They are used to intercept communication between the ships of another state, and of the ships and their coastal bases. These ships also listen to conversations on submarine cables. Western sources have accused Soviet vessels of hovering around submarine cables linking the western world.

In addition to the direct activity of the vessels at sea, there is also an increasing use of sea-based aircraft in intelligence gathering. These planes are based on aircraft carriers or on other surface naval ships. From the airspace above the High Seas, these aircraft photograph coastal defences, "buzz" naval ships and intercept telecommunications from the air. One such plane, the RB47 belonging to the American Navy, was shot down by Soviet aircraft in 1960. This incident provoked protests and soured relations between the two powers.

3:2:2:(c) Reconnaissance from Neighbouring Territory

States have stationed highly sensitive eavesdropping equipment on the territory adjacent to that of a state under surveillance. They have also stationed long range cameras and highly sensitive electronic light beams near border points or sensitive military border installations. The main purpose of these activities is to keep the target state under surveillance and gather as much intelligence as possible. These activities are likewise reconnaissance activities.

3:2:2:(d) Reconnaissance From Within the Territory of the Reconnoitering State

There are some reconnaissance activities which may be carried out within the territory of the reconnoitering state even if it is not a neighbouring state. Of these activities the most important is the use

of creative intelligence or gaming to obtain valuable information about the target state. Highly trained researchers are able, with the help of information obtained either from espionage, other forms of reconnaissance or diplomacy, about a given situation and the human actors in the situation in a particular country, to predict the future developments in that situation. This prediction is based on a game, whereby the players imagine themselves as the characters and in the situation that is simulated. For centuries now, creative intelligence has been used and has yielded very accurate results.⁵⁹

3:2:2:(e)

Reconnaissance from Outer Space

One important and novel area of state activity which has been opened up in the 20th Century has been outer space. The opening up of outer space represents a feat of scientific wizardry, which illustrates man's continuing conquest of the elements of nature. Intelligence gathering from space has developed into a very important activity since the launching of the first artificial satellite in 1957. Since 1957, the world's leading military and economic powers have put into orbit hundreds of space crafts which perform several multifarious functions. From far up in space artificial satellites, among other functions, reconnoitre the earth. They photograph any spot on earth, track down the movement of naval vessels at sea, especially submarines, keep surveillance upon missile sites, detect nuclear explosions and give advance warning of attack. In addition to these functions, space craft also carry out the remote geophysical sensing

of the earth's resources. Down to earth, satellites send back high resolution photographs of what they see on the earth below them. Some send back computer messages of what they detect. The use of satellites in intelligence gathering has become so important, that the super powers have considered and implemented the development of anti-satellite systems (ASAT) and laser beams to destroy or blind them in case of an armed conflict.⁶⁰

In addition to the use of satellites, the super powers rely on manned space missions for purposes of reconnaissance. The Soviet Union maintains manned stations in space while the United States relies on the sending of occasional missions into space.

These new activities of intelligence gathering in outer-space transcend the old "cloak and dagger" business of espionage and fit, instead, into the concept of peacetime reconnaissance. The increased use of these activities by states calls for an inquiry into their legality under International Law - a matter to which this thesis pays attention in a subsequent chapter.⁶¹

1:3:0

A Summary of This Chapter

International Law has developed along the dichotomy of peace and armed conflicts. Likewise, intelligence gathering activities are distinguished, depending on whether they are carried out in peacetime or in armed conflict.

Intelligence gathering activities in times of armed conflicts may be divided into four categories; Espionage, Ordinary Treason, War Treason and Reconnaissance. Espionage is that activity where the sending state employs its own citizens or citizens of a third state to gather Intelligence about the hostile party or state. Nationals of the hostile party who gather intelligence for the sending state are guilty of ordinary treason on the basis of their breach of allegiance to their sovereign. Espionage is characterized by the fact that the agents employed use false pretences or clandestinity. A traitor remains a traitor whether he uses clandestinity or not. Spies gather information in the zone of operations of a belligerent. In modern circumstances, the zone of operations co-extends with the entire territory of the belligerents. Both civilians and soldiers, irrespective of sex, may act as spies.

Some activities of gathering intelligence, carried out by particularly civilians, may fail to qualify as espionage because of failing to satisfy one or the other of the basic ingredients of the activity of espionage. So long as these activities are intended to favour one of the parties to the conflict and to harm the other, they are regarded as war treason. They are not necessarily confined to occupied territories. An example here is when an enemy civilian, without false pretences or clandestinity, gathers intelligence to favour his own forces. It is necessary to note that if these activities are carried out by nationals of a state against it, they are ordinary treason.

Reconnaissance activities in times of armed conflicts are those activities where soldiers in uniform, not wearing a disguise and not using any form of clandestinity, by using the military instrumentalities of a belligerent, gather information about the enemy (or another party to the conflict). International Law permits the use of secrecy required to give effectiveness to their mission.

While the Law of International Armed Conflicts has received these concepts from the Laws of War, the law relating to internal conflicts has no such concepts of these activities. It is only hoped that as International Law develops, these clear concepts will also emerge.

In the Law of Peace, two main activities of intelligence gathering exist - espionage and reconnaissance. Peacetime espionage is that activity carried out by states whereby they employ secret agents to gather vital intelligence about other states. Spies in peacetime, like in time of armed conflict, use false pretences or clandestine methods. The Law of Peace does not know of treason based on activities of gathering intelligence. The lack of such a doctrine of treason in peace is shown in state practice and municipal law. Persons who gather Intelligence clandestinely about a state for transmission to another state are spies irrespective of their nationality.

FOOTNOTES

1. Regulations Respecting the Laws and Customs of War on Land Annex to the Hague Convention of October 18, 1907 (Convention IV of 1907) here in cited as the Hague Regulations of 1907, Articles 29-31. See also Halleck, "Military Espionage" (1911) Vol. 5, A.J.I.L. 590 at n. 591 says: "Spies are persons who in disguise or under false pretences insinuate themselves on the enemy in order to discover the state of his affairs and then communicate to his employers the information thus obtained."
2. Protocol I Additional the Geneva Conventions of 12 August 1949 of 1977 (here in cited as Protocol I) Art. 46.
3. First paragraph of Article 29.
4. (1949) Vol. 16, I.L.R. 266.
5. At n. 271.
6. Oppenheim International Law - A Treatise, Vol. II (London, Longman Green & Co. 1906) first Edition p. 159.
7. See Gihil T.'s, "Who is a Spy?" in Legal Essays a Tribute to Frede Casteberg, (Oslo, 1963) pp. 230-240 at p. 232.
8. Geneva Conventions of 1949. See in particular Art. 4 of Convention III (Prisoners of War).
9. (1948) Vol. 15, I.L.R. 423.
10. Art. 23 of The Hague Regulations now re-affirmed in Articles 37, 38 and 39 of Protocol I of 1977.
11. Kunig, Philip: "Theatre of War" in Bernhardt (Ed) Encyclopaedia of Public International Law, Vol. 4, (North Holland Publishing Co. 1982,) pp. 331-334.
12. Oppenheim: International Law-A Treatise, Vol. II 7th Edition by H. Lanterpacht (London, Longmans, 1952) at n. 237.
13. Whiteman M., Digest of International Law, (Washington, State Department) Vol. 10, 1968, no. 182-183.
14. (1919-1922) Vol. I, A.D., no. 431-432, case number 298.
15. At n. 232.
16. (1956) Vol. 23, I.L.R., p. 759.
17. At n. 761.
18. Halleck, Loc. cit., n. 593 and 594.

19. See Art. 5 and Art. 68 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949 (Convention IV or Fourth Convention as herein cited).

20. Uhler and Coursier: Commentary on the 4th Convention, (Geneva I.C.R.C. 1948) pp. 50-58.

21. Art. 46(1).

22. Art. 46(2).

23. Art. 46(3).

24. Art. 46(4).

25. Official Records of the Diplomatic Conference on the Re-Affirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva 1974-1977, (Bern, Federal Political Dept. 1978) Volume VI. p. 111, Volume XIV, n. 292 and Volume XV, p. 90.

26. Dulles A.W., (Ed) Great True Spy Stories, (New York, Harper and Row 1968.)

27. Ayala, Balthazar: De Jure et Officis Belicis et Disciplina Militari Libri III, Edition of 1581 Translated by J.P. Bate in 1912. (New York, Oceana, 1964, Reprint), p. 219.

28. Halsbury's Laws of England, 4th Edition, Volume II, para. 811 and 815.

29. In the case of Re Flesche Supra, note 7.

30. Coleupagh V. Looney Supra, note 20 and also the case of Ex parte Quirin (1942), Vol. 37, A.J.I.L. 152.

31. For a detailed history of the period, see Best G.: Humanity in Warfare (London, Weidenfeld & Nicolson, 1980) Chapters 1, 2, and 3.

32. See Wheaton: Elements on International Law Text of 1866, (New York, Oceana (reprint) 1964,) p. 33 and p. 363, especially the footnotes at pp. 363-365, and see also Hall, W.E., International Law, Fourth Edition, (Oxford, Clarendon Press, 1895) at p. 587.

33. Art. 90-104 of the American Instructions of 1863 laid down the law applicable in belligerent occupation.

34. Ibid.

35. Baxter R.R.: in (1950) Vol. 27, B.Y.I.L. 235, at pp. 253-266.

36. Oppenheim "On War Treason" (1917), Vol. 33, L.Q.R. 266, pp. 283.

37. Greenspan; The Modern Law of Land Warfare, (Los Angeles, University of California Press 1959,) p. 326.

38. See the case of Ex Rel Wessels, note 14 Supra.
39. A further study of these activities is found in Baxter, R.R. 1950, Vol. 27 B.Y.I.L. 235.
40. Second paragraph of Art. 29 of the Hague Regulations of 1907.
41. See in particular the use of Robot Aircraft by Israel in the war in Lebanon of 1982. Rodney Crawton in his article "West Learns Lessons of War in Lebanon" in The Times of London, February 14, 1983 gives an account of the Israeli activities.
42. Deacon, Richard; The Silent War - A History of Western Naval Intelligence, (London, David and Charles, 1978) gives a candid history of the development of intelligence gathering activities in this field.
43. Von der Heydte; "Military Reconnaissance" in Bernhardt (Ed) Encyclopaedia op.cit., Vol. 3, n. 279.
44. Oppenheim; International Law Treatise, Vol. I, Peace, 8th Edition By Lauterpacht (London, Longmans, 1952) n. 845.
45. See Dulles A. Supra, note 26.
46. See the following cases: R.V. Blake (1961) 3 All E.R. 125, R.V. Oakes (1959) 2 All E.R. 92, R.V. Britten (1969) 1 All E.R. 517, R.V. Fuchs footnoted in (1961) 3 All E.R. 127. U.S.V. Coplon 84 F Supp 472, 50 NY (1950). Also, see 88 F. supp 915.
47. See Kenya Penal code cap 63 Laws of Kenya S:40(22(b)). Also Halsbury's Laws, Vol. 11, op.cit., para 811 and 815. See also Gordon G.H., Criminal Law of Scotland, second edition, (Edinburgh, Green and Co. Ltd., 1978) n. 927.
48. See for example, Kenya Official Secrets Act, Chapter 187, Laws of Kenya, 83. Also Britain Official Secrets Act 1911 as amended by the Official Secrets Act 1920, Section I. See also United States Espionage Acts, 18 U.S.C. S 793 (1976) and 18 U.S.C. S 794.
49. Gihil op.cit. at n. 232.
50. Newsweek Magazine, April 16th, 1983.
51. Von der Heydte Loc.cit. n. 279.
52. See Wright, Quincy in "Legal Aspects of the U-2 Incident" (1960)
54. A.J.I.L. 836 and Lissitzyn, O. in "Some Legal Aspects of the U-2 and RB47 Incidents" in (1962) 56, A.J.I.L. 135.
53. Gihil Loc. cit., n. 232.

54. This was the view of Quincy Wright in 54 A.J.I.L. 836 supra note 52 and Stone J. in "Legal Problems of Espionage in Conditions of Modern Conflict" in Stanger R.J., (Ed) Essays on Espionage and International Law. (Ohio, Ohio State University Press 1962)

55. On the 12th of July 1955, Bulgarian forces shot down an intruding Israeli EL AL passenger airliner which had been suspected of carrying out intelligence activities. In 1973, Israeli jets shot down a Libyan passenger airliner on the same suspicions.

56. Newsweek Magazine, 5th September 1983.

57. Copeland, M., op. cit., pp. 317-318.

58. See Deacon R.; Supra, Chapters 14, 15 and 16, pp. 224-264.

59. For a fuller account of the theory of Creative Intelligence, see Wilson, A. War Gaming, (Harmondsworth, Penguin Books 1968)

60. Golden, F. "Space, Looking and Listening in the Heavens", Time Magazine, Vol. 22 of 1982. See also Holloran, R., U.S. Turning its Attention to New Shpere of Operations: Space in International Herald Tribune, London, October 20, 1982.

61. In chapter 4, infra.

CHAPTER FOUR

THE LEGALITY OF INTELLIGENCE GATHERING ACTIVITIES
IN INTERNATIONAL LAW

The question whether International Law permits or prohibits intelligence gathering activities in both peace and armed conflicts has exercised the mind of many a jurist. The examination of the legality of these activities is the primary aim of this chapter.

4:1:0

IN THE LAW OF ARMED CONFLICT

4:1:1 Past Controversies: Legal opinion has not been unanimously agreed whether International Law permits intelligence gathering activities, especially espionage, treason and war treason, during war. In the many divergent opinions on the matter, three main schools of thought may be identified.

One school of thought is of the view that espionage and war treason are war crimes. They are war crimes because they may be punished during war. Oppenheim,¹ one of the exponents of this view, insists that by terming these activities war crimes he does not impute upon them the moral wrong of a crime. Instead the term is used in a technical sense, "on account of the effect that these acts may be met

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with punishment by the enemy." Espionage and war treason, as war crimes, are indeed distinguished from those crimes which involve the violation of the customary rules of the Laws of War and the provisions of the Geneva Convention of 1864.

The same view was expressed in the case of Re List (The Hostages Trial).² The U.S. Military Tribunal at Nuremberg distinguished between international war crimes and pure war crimes. Espionage and war treason were pure war crimes. The Court said:

"An international crime is such an act universally recognized as criminal which is considered a grave matter of international concern and for some valid reason cannot be left to the exclusive jurisdiction of the state that would have control of it in ordinary circumstances. The inherent nature of a war crime is ordinarily itself sufficient justification for jurisdiction to attach to the courts of the belligerent into whose hands the criminal has fallen. Some war crimes, such as spying, are not common law crimes, they being pure war crimes punishable as such during war and in this case only if the offender is captured before rejoining his army but other war crimes, such as mass murder, are punishable during and after the war."³

In its judgement, the Military Tribunal expressed the view that although the Law of War allowed belligerents to punish spies as a means of deterrence and self defence, the Law of War allowed as well the sending of spies.⁴ The same views have been expressed by an Israeli Court in the case of Attorney General for Israel V Sylevester.⁵

The views expressed by Oppenheim and the courts in the two cases suggest in general that though International Law permits the bellig-

erents to punish captured spies and war traitors, their activities are not prohibited by the Laws of War. The belligerent parties may have recourse to those activities. The fact that these activities are termed war crimes whether "pure" or "special" is one that may cause confusion. These activities are likely to be confused with war crimes which involve the violation of the Law of War.

The second school of thought was of the view that spies are offenders against the Laws of War and espionage is unlawful belligerency. The most vocal exposition of that view is found in the judgment of the U.S. Supreme court in the case of Ex Parte Quirin.⁶ The court said:

"By universal agreement and practice, the Law of War draws a distinction between the armed forces and peaceful populations of belligerent nations and also between lawful and unlawful combatants. Lawful combatants are subject to capture and detention by opposing military forces. Unlawful combatants are likewise subject to capture and detention but, in addition, they are subject to trial and punishment by military tribunals for acts that render their belligerency unlawful."⁷

To the Supreme Court, spies were offenders against the Laws of War and subject to the jurisdiction of military tribunals for the acts that made their combatancy unlawful.

The opinion of the court was commended by Hyde⁸ as "a bold and fresh view" on the position of espionage in the Laws of War. Hyde particularly did not seem to agree that spies are punished for acts that are not wrongful under the Laws of War. The view of the court was followed in another U.S. case, the case Coleupagh V. Looney.⁹

The third school of thought has arisen in order to correct the view of the Supreme Court in Ex Parte Quirin. The theory was put forward by Baxter¹⁰ and supported by Stone.¹¹ According to this school of thought, espionage, war treason and similar measures are legitimate forms of combatancy. Although they are legitimate forms of combatancy, those who carry out those activities were unprivileged combatants. They are not entitled to the privileges enjoyed by other combatants. They need not be treated as prisoners of war upon capture, but instead they may be punished for their activities.

The argument begins from the fact that customary law permits belligerents to employ means and measures to obtain information about the opposing army and about the country.¹² This means, therefore, that activities aimed at procuring information are not unlawful under the Laws of War. The fact that those who participate in these activities are punished does not prove by itself that these activities are therefore unlawful. There are activities for which individuals may be punished, under the laws of war, although their acts may not be unlawful in themselves. These acts include breach of blockade, unneutral service, transport of contraband of war and the actions of resistance fighters in occupied territory. In the case of spies and war traitors, they are punished merely in self defence and in order to deter future spies or war traitors. Baxter concludes his argument thus:

"As long as espionage is regarded as a conventional weapon of war, being neither treacherous nor productive of unnecessary suffering, the sanctions visited on spies are only sanctions to deter the use of that ruse. The actions of a spy are not an international crime, for by his conduct he merely establishes that he is a belligerent with no claim to any of the protected statuses which

This thesis had been advanced earlier in the case of Re Flesche.¹⁴ The Dutch court of cassation held that espionage is not a war crime as it was not forbidden by the Laws of War. It is an activity which is very hazardous for the persons concerned, since the opposing party on grounds of self-defence and deterrence may impose the death sentence as a penalty for that activity. It was one of those activities under the Laws of War which were not crimes but for which the Laws of War permitted a belligerent to punish the participant.

4:1:2

Intelligence Gathering Activities
As Forms of Unprivileged Combatancy

Of the three schools of thought regarding the legality of intelligence gathering activities in the Laws of Armed Conflicts, the most attractive is that which asserts that these activities are legitimate wartime activities, although the participants are not entitled to the privileges accorded to other combatants. This school avoids the semantic problems of calling them "pure war crimes" which can lead to a misunderstanding. It also avoids the legal inaccuracy of calling these activities unlawful combatancy on the simple premise that participants in these activities may be punished.

The rule that participants in intelligence gathering activities commit no offence against International Law, although the belligerent may punish them in self defence, is a well entrenched one in International Law. The earliest publicists were unanimously of the view that the Laws of War beyond doubt permitted a state to commiss-

ion spies and exploit the treason of the enemy subjects for the purposes of obtaining information.¹⁵ The punishment of spies was justified as the only means through which a belligerent could protect himself from their secret activities and by threatening and imposing such heavy punishments, deter future spies.¹⁶ In addition to these grounds, traitors were punished for the breach of allegiance to their sovereign.¹⁷

These rules have continued to be accepted as law. But there were objections to the practice of espionage on moral grounds.¹⁸ These objections did not have any impact on the legality of these activities. The rules were accepted as legal by later publicists¹⁹ and codified into treaties on the Laws of War and other codifications of the late 19th Century and 20th Century.²⁰

Article 24 of the Hague Regulations of 1907 provides that;

"Ruses of war and the employment of measures necessary for obtaining information about the enemy and country are considered permissible."

This provision is a clear testament to the fact that the Laws of War permit intelligence gathering activities. This rule has been re-asserted by its inclusion in the military manuals of most states as an indication of state practice in the matter.²¹ The U.S. Manual says that the Hague Regulations:

". . . tacitly recognize the well established right of belligerents to employ spies and other secret agents for obtaining information of the enemy. Resort to that practice involves no offence against International Law. 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 possible."²²

With the extension of the Laws of War to all international armed conflicts by Protocol I of 1977, this rule has been extended to all armed conflicts. The Protocol permits the use of ruses of war which are not perfidious²³ and expressly states that it does not intend to affect the existing, generally recognized rules of International Law applicable to espionage.²⁴ The rule that a belligerent may employ measures and means of obtaining information about the enemy, implied as it is, is one of these rules which have not been affected.

While belligerents may employ activities of gathering intelligence about the enemy without offending International Law, there are certain activities which are prohibited. The Law of Armed Conflicts abhors perfidy.²⁵ Perfidious acts intended to acquire intelligence from the enemy are therefore prohibited. According to Article 37(1) of the Protocol:

"It is prohibited to kill, injure or capture an adversary by resorting to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of International Law applicable in armed conflict with intent to betray that confidence shall constitute perfidy."

The Law of Armed Conflicts also prohibits the use of enemy uniforms, insignia, emblems and flags.²⁶ These may not be used by the parties as a means of gathering intelligence as well. It is also prohibited to use the uniforms, insignia, emblems or flags of a state not party to the conflict.²⁷ The law goes further also to prohibit the use of the recognized emblems of the Red Cross and the United Nations by the parties to a conflict.²⁸

To conclude this section, it is clear that the Law of Armed Conflicts positively permits the deployment of intelligence gathering activities by parties to an armed conflict. If participants in these activities are punished, it is not because they violate the Laws of Armed Conflicts, but because they do not fit into any of the privileged categories of combatants created under International Law. The participants in these activities are therefore unprivileged combatants. As unprivileged combatants, they will be regarded as war criminals only if they use measures which are prohibited by the Law of Armed Conflicts in furtherance of their activities.

4:2:0

IN THE LAW OF PEACE

The question whether International Law permits peacetime intelligence gathering activities has led to an intensive debate among the foremost international law scholars. Some have been inclined to think that International Law does not permit these activities. Others have argued that there is no rule of International Law prohibiting these activities and so they must be treated as permitted.

4:2:1

The Debate Revisited

The majority of scholars who have addressed themselves to the problems of peacetime intelligence gathering activities have been of the view that these activities are not prohibited by International Law. Oppenheim²⁹ notes that states constantly send spies abroad in

peacetime. This practice cannot be considered wrong morally, politically or legally, he argues, but adds that spies are not recognized agents of states.

This view has led to the argument that International Law in peacetime does not know the offence of espionage. The case of Schmidt Marquadt V. Director of Prosecutions³⁰ was decided on this view. The Soviets sent Mrs. Schmidt Marquadt, from their zone of occupied Germany into the British zone. Her mission was to find out information about Soviet defectors. She was apprehended by the British authorities and charged with espionage. The British court was of the view that whereas International Law in war knew of the offence of espionage, such an offence was unknown to the Laws of Peace, except where it has been specifically created under municipal law.³¹ Mrs. Schmidt-Marquadt had committed no offence. This view was also superbly summed up by the Polish delegate to the Security Council during the debate on the U-2 Incident, when he said that International Law had never concerned itself with peacetime espionage.³²

Scholars have gone ahead to argue that since International Law does not have a rule prohibiting peacetime intelligence activities, they are therefore permitted by it.³³ These Scholars have based themselves on the holding of the P.C.I.J in the case of the S.S. Lotus.³⁴ This view is very sound, if the facts and the ruling of the P.C.I.J. in that case are appreciated. In that case, there was no rule of International Law expressly permitting Turkey to punish an officer of a French ship for acts of negligence on the French ship on

the High Seas which caused a Turkish ship to sink with a considerable loss of life. International Law recognized that the Law applying on board a ship on the High Seas is that of the nation whose flag it flies. There was no rule expressly permitting or prohibiting a state which suffered as a result of the negligence of the officer aboard a ship whose effects were felt on another from punishing such a person. The court rejected the view advanced by France that where International Law does not lay down a permission, then there is a restriction. The Court instead upheld the right of Turkey to punish the French officer. The Court in the words of Judge Loder (dissenting) upheld Turkey's defence:

"... based on the contention that under International Law everything which is not prohibited is permitted . . . The Court, in its judgement, holds this view is correct and in accordance with the facts."³⁵

The legitimacy of peacetime intelligence gathering activities can also be asserted by looking at municipal legal systems. Municipal legal systems make it clear that an activity cannot be treated as illegal unless there is an express rule saying so.³⁶ In the absence of such an express rule the activity must be treated as permitted.

Another argument which has been advanced in favour of the view that espionage and reconnaissance in peace are not illegal under International Law is that the practice of states does not indicate that they are illegal. With respect to espionage, it is argued that espionage is an ancient practice carried out by States. Its long history, if anything, proves its legitimacy. Secondly, for both reconnaissance and espionage, it has been validly argued that if they

were international delinquencies, then States would be justified to protest and seek reparations from the State employing the secret agents. An international delinquency justifies the aggrieved state to protest and seek reparations from the offending State.³⁷ When agents involved in procuring intelligence are apprehended, States never protest or seek reparations from the sending State, even if the State employing these agents has been identified. This is a recognition of the fact that the sending State is doing no wrong and that there is no international wrong suffered by the target State to complain about. If protests are ever made, they are always muted and symbolic but not express. The Canadian experience in this matter is very demonstrative. In 1945, a Soviet Embassy cipher clerk, Guzenko, based in Canada, defected to the Canadians. He revealed Soviet espionage networks in Canada whose aim was to steal the secrets of the atom bomb. A near international crisis raged. Consultations were made between the Western Powers at the highest levels. Both Canada and U.S.S.R. recalled their Ambassadors, some of the Soviet embassy staff in Canada were declared persona non grata. In spite of all these developments, the Government of Canada never launched an official protest to the U.S.S.R. It did not seek reparations for the activities of the agents of the U.S.S.R. which were injurious to its defences and interests.³⁸

In the light of contemporary politico-military conditions, particularly in the delicate east-west balance of terror and acute rivalry, intelligence gathering activities have been properly looked at as a bulwark for peace. In the absence of an international system

of supervising troop strengths, armaments and disarmament, technological developments, especially in weapon developments intelligence activities provide an alternative system. States are able to monitor developments in other States. An effective intelligence system ensures against surprise attacks and therefore reduces the chances of the outbreak of war. The balance of power between the various state blocks ensures that a nuclear holocaust will not break out. Intelligence gathering activities are a key component in this system; to illegalize them would be to do a great disservice to humanity.

In spite of these very persuasive arguments, there is a minority legal opinion that has asserted that peacetime intelligence activities, in particular espionage, are prohibited by the Laws of Peace. This opinion also holds that a State which deploys these activities, commits an international delinquency against the target State. These arguments, raised by this school, may, however, be easily set aside as contrary to the general trend of International Law as demonstrated in the foregoing.

In the case of Re Flesche,⁴⁰ the Dutch Court of Cassation stated that whereas wartime espionage was permitted between nations by the Law of War, peacetime espionage was not permitted by International Law. It was an international delinquency committed by the State employing the spy. The sending State was answerable for this delinquency under International Law, the Court asserted.⁴¹ The Court of Cassation did not cite any authority for its proposition either in International Law or state practice. As already indicated, State Practice and International Law, on the contrary, contradict that view.

Prof. Quincy Wright in his article on the U-2 Incident⁴² asserts that peacetime espionage is illegal. He explains that in recognition of the illegality of the activity, States never protest when spies sent by them are apprehended and punished by the target State. Prof. Wright does not cite any authority for his proposition, although it has been supported by an Indian author, K. Ahluwalia.⁴³ This proposition has the effect of inverting the argument of the proponents of the theory that espionage is not prohibited by International Law in peace. It brings to the fore, once again; whether the fact that an activity is punished by a State against whom it is directed, is by itself a good proof that the activity is prohibited under International Law. As explained before, this is not enough since under International Law there are many activities which may be validly and legitimately carried on by States, but for which activities International Law permits the target State to punish the individual participants who fall into its power in self-defence.⁴⁴ Since peacetime intelligence gathering activities harm the interests of the target State, to the benefit of the sending State, it maybe said that the target State may punish such activities in the interest of self defence. If States do not complain when their secret agents are arrested and punished, or accredited diplomats are declared persona non grata for involvement in such activities, it is not so much because they realize the delinquency inherent in the activity, but rather that they recognize the right of the target State to punish such agents in self-defence, and in order to deter those who may in future wish to involve themselves in such activities. This spirit of self-defence and deterrence is reflected in the attitudes of municipal

courts. In convicting a spy who had served the U.S.S.R. inside Britain for more than twenty years, a British Court justified its lengthy sentence of forty-four years imprisonment that:

"This sentence had a threefold purpose. It was intended to be punitive and calculated to deter others and it was meant to be a safeguard of the country."⁴⁵

In another British case the Court said:

"Contraventions of the official Secrets Acts which prejudice the defence of this country and which may thus tend to endanger the lives of members of the community are in a category of their own. The perils they create and thus the sentences that are appropriate in the interests of the community will of course vary according to the circumstances of the particular case. In recent decades the dangers of mass destruction of life and property at the hands of an opposing power have increased to an outstanding degree and it follows that as dangers increase so does the need in protection of society for sentences of deterrent length."⁴⁶

Besides, Prof. Wright's argument does not explain at all why the target State on capturing a spy or locating a foreign reconnaissance agent does not protest to, or seek reparations from the sending State. An international delinquency would entitle the offended State to make a protest and seek reparations from the wrong-doing State.

The other argument raised by those who assert that espionage is illegal under International Law in peace is that if it were not, it would lead to dangerous consequences for international peace.⁴⁷ This argument is not valid since it has already been demonstrated that intelligence gathering activities in time of peace serve an important function in preserving peace.

Ahluwalia further contends that espionage is illegal in peace because it is not compatible with the doctrine of state sovereignty and territorial supremacy which are still the very foundation of International Law.⁴⁸ This argument tends to confuse two issues. The first issue is whether it is the intelligence gathering activities which are not permitted by International Law. The second is whether the activities are legal but have been soiled by the illegality of the means used in carrying them out.

The breach of the territorial sovereignty of a state, by effecting an illegal entry into its territory, its territorial seas and the airspace suprajacent thereto, is indeed the commission of an international delinquency by the State that undertakes such activities. An international delinquency may also arise if the diplomats accredited by one State to another abuse their privileges and immunities by involving themselves in activities incompatible with their status and duties as diplomats. Once intelligence gathering activities are associated with such activities, they are regarded as violations of International Law, not because of the illegality of the intelligence gathering activities, but because of the illegality of the methods by which they are carried out. This is a case of collateral illegality.

4:2:2

Collateral Illegality and Peacetime
Intelligence Gathering Activities

Some intelligence gathering activities are tainted with collateral illegality, while others are not. A State which sends a

spy or a reconnaissance agent, who lawfully enters a target State, commits no international wrong. The sending of spies per se is not prohibited by International Law. But should such a State send its agent into the target State unlawfully, then there is a breach of the territorial sovereignty of the target State - an international delinquency for which International Law permits the target State to protest.⁴⁹

Likewise, a State which sends a reconnaissance aircraft into the airspace of the target State commits an international wrong. A State has exclusive jurisdiction over the airspace above its territory and the sending of aircraft into it is a breach of its sovereignty. The State would therefore be justified to protest against this territorial intrusion under International Law.⁵⁰ A similar position maybe held with respect to sending reconnaissance seacraft into the territorial waters of a State.

It is, however, important to note that there are certain reconnaissance activities which may be carried out both from airspace and from the sea without offence to the target State or to International Law. Aircraft above the High Seas and above neighbouring territory may lawfully carry out surveillance of the target State.⁵¹ Not having violated the territorial sovereignty of the target State, such a State suffers no wrong to protest about. The same may be said of activities of gathering intelligence carried out by surface ships and submarines from the High Seas and by electronic peeping toms and eaves-droppers from neighbouring territory.

It is also important to observe that activities of gathering intelligence based in the High Seas or on neighbouring territory could have intrusive effects on the target State. If activities of gathering intelligence have such an effect, they then obviously infringe the territorial sovereignty of the target State.⁵² They create the kind of disturbance on the territory of a neighbouring state which is not permitted by International Law.⁵³ An example of such an activity would be the use of strong light beams across a frontier at night. Other activities which do not have this kind of effect are however permitted by International Law. The use of devices such as sensitive long range cameras, listening devices and other types of sensors based on the territory of a neighbouring territory, are an example of the latter kind of activity.

The principles enunciated above are based on certain basic principles of International Law. The first is that International Law does not permit a State to infringe the territorial sovereignty of another State. All activities carried out in the territory of a State without its permission are not allowed by International Law. The second principle is that International Law permits a State to carry out any activities in its territory it wishes, provided such activities are not in breach of International Law and do not endanger neighbouring States. Intelligence gathering activities carried out in a neighbouring State which do not infringe International Law and do not harm the other State may be carried out.⁵⁴ The third principle is that of the freedom of the High Seas. The High Seas are res communis omnium. Nations may use the High Seas freely and on a basis of

equality. The use of the High Seas for intelligence gathering activities is in accordance with this principle of freedom. Since time immemorial, the High Seas have indeed been communally used by nations for both pacific and warlike activities. The principle of freedom which applies to the High Seas, likewise, applies to the airspace suprajacent to them.

Outer space, like the High Seas, is considered res communis omnium.⁵⁵ All States are free to use outer space, on the basis of equality.⁵⁶ Outer space can only be used in accordance with International Law.⁵⁷ Both treaty law and the resolutions of the U.N. General Assembly agree that outer space can only be used for peaceful purposes.⁵⁸ Whether or not reconnaissance activities in outer space will be regarded as legal, will depend on whether they can be classified as peaceful purposes in the context of modern Space Law.

It has already been advanced that intelligence gathering activities are a very important aspect in the search for world peace and in the prevention of an outbreak of war. If intelligence gathering activities do serve this purpose, it is submitted that they must be regarded as peaceful activities. Secondly, as some authors have argued, since reconnaissance activities cannot be looked upon as violations of Article 2(4) of the U.N. Charter and, since States have

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never protested at the use of outer space for reconnaissance activities, it cannot be argued that these activities are prohibited by International Law.⁵⁹ The permission for all reconnaissance activities in outer space must, however, be distinguished from the prohibition by International Law of the use of the moon and other celestial bodies for any military purposes. The Moon Treaty prohibits the erection of military installations of any kind whatsoever on the moon and other celestial bodies.⁶⁰

4:3:0

A Summary of this Chapter

In times of both armed conflicts and peace, International Law permits States to carry out intelligence gathering activities. Any theories to the effect that intelligence gathering activities are prohibited by International Law are misconceived. In times of armed conflicts, the development of the Law of War and that of armed conflicts solidly indicate that intelligence gathering activities, espionage and reconnaissance are expressly permitted by International Law. International Law, at the same time, permits the offended belligerent to punish some participants in these activities. This right to punish some of these persons is not based on the illegality of these activities. Punishment is justified as a measure of self defence and a means of deterrence against persons who may wish to serve in similar capacity in future.

Like in the time of armed conflicts, the absence of a rule of International Law expressly prohibiting intelligence gathering activities in peacetime means they are permitted. Where peacetime intelligence gathering activities are tainted with a breach of rules of International Law, such as unlawful territorial intrusion or abuse of diplomatic privileges, it is the collateral breach which must be regarded as unlawful and not the activity itself. Participants in peacetime intelligence gathering activities may be punished by the target State only if they infringe its domestic laws - a further proof of the fact that International Law does not outlaw their activities.

FOOTNOTES

1. Oppenheim L., International Law, A Treatise, Volume II (London, Longmans, Green & Co. 1906) pp. 263-4 and pp. 267-268
2. (1948) Vol. 15, I.L.R. 632.
3. at p. 636.
4. at p. 640.
5. Attorney General for Israel v Sylevester (1948) 15 I.L.R., n. 573, case No. 190.
6. (1943) Vol. 37, A.J.I.L. 152.
7. at p. 161.
8. "Aspects of The Saboteur Cases" (1943), Vol. 37 A.J.I.L. 88.
9. (1956) Vol. 23, I.L.R. 759.
10. Baxter R.R., "So-Called Unprivileged Belligerency" (1951), 28 B.Y.I.L., pp. 322-345.
11. Stone J., Legal Controls of International Conflicts 2nd Revised Edition (Sydney, Maitland Publications PTY Ltd. 1959,) see especially discourse 29, pp. 562-570.
12. Art. 24 of the Hague Regulations of 1907.
13. 28 B.Y.I.L. at p. 333.
14. (1949) Vol. 16, I.L.R. 266.
15. See the Works of Grotius, Wolf, Gentili, Ayala, Legnano, Bynkershoek, and Vattel citations given at the beginning of Chapter I, footnote 13.
16. Gentili op.cit., n. 174.
17. Vattel op.cit., pp. 299-300.
18. Halleck: "Military Espionage" (1911) Vol. 5., A.J.I.L. 590, pp. 591-592.
19. See Lawrence Principles of International Law, (London, McMillan & Co. 1875) pp. 426-428 and also Oppenheim L., op.cit. (first Edition) at pp. 159-160.
20. Brussels Declaration 1874 Art. 14 and Hague Regulations 1899 & 1907 Art. 24.

21. In Re List et al the U.S. Military Tribunal was of the same opinion. See Vol. 15, I.L.R. at n. 651.

22. U.S. Field and Army Manual, (Washington Department of Defence, 1956) para 77.

23. Art. 37(2).

24. Art. 39(3).

25. Art. 23(b) of the Hague Regulations of 1907.

26. Art. 23(f) of the Hague Regulations of 1907.

27. Art. 39(1) of Protocol I of 1977.

28. Art. 38 of Protocol I of 1977 and see also Art. 23(f) of the Hague Regulations of 1907.

29. Oppenheim International Law - A treatise Vol. I: Peace, (London, Longmans 1952.) 8th Edition by H. Lanterpacht n. 845.

30. (1949) Vol. 16, I.L.R. 405.

31. at n. 406. The judge says: "Whereas in the case now before us, the espionage is alleged to have been committed by the agent of a power with whom we are not at war, what constitutes espionage is by no means clear."

32. Quoted in "Legal Aspects of Reconnaissance in Airspace and Outer Space" (1961), Vol. 61 Col. Law J., n. 1074, footnote I.

33. Gihil: "Who is a Spy?" in Legal Essays - A Tribute to Frede Casteberg, (Oslo 1963.) See also Stone J., "Legal Problems of Espionage in Conditions of Modern Conflict", in Stanger R.J. (Ed) Essays on Espionage and International Law, Ohio, (Ohio State University Press 1962,) nn. 32-33.

34. P.C.I.J. Series A, No. 10.

35. at p. 34.

36. Stone J., Loc. cit. n. 33.

37. Gihil Loc. cit. nn. 230-231.

38. Cohen, M., "Espionage and Immunity" (1948) 25 B.Y.I.L. 404.

39. Stone Loc cit. n. 41-42.

40. See note 14 supra.

41. at page 272.

42. (1960) 54 A.J.I.L. 835 at n. 850.

43. (1961) Vol. I, I.J.I.L. 301-307.
44. See part A of this chapter.
45. R.V. Blake (1961) 3 All E.R. 125 at p. 128.
46. R.V. Britten (1969) 1 All E.R. 517 at p. 521.
47. See Ahluwalia K, Loc. cit. at p. 305.
48. Loc. cit. at p. 305.
49. Stone J., Loc. cit., p. 32.
50. See Lissitzyn Loc. cit. 56 A.J.I.L. pp. 135-140.
51. Lissitzyn, Ibid. and also see note in 61 Col. Law J. 1074. Legal Aspects of Reconnaissance in Airspace and Outer Space.
52. Von der Heydte Loc. cit. p. 280.
53. C/f The Trail Smelter case (U.S. v Canada) in Harris D.J., Cases and Materials in International Law, (London, Sweet & Maxwell 1973) at p. 231.
54. The harm envisaged here is like that in the Trail Smelter case Ibid. The Tribunal in that case said: "Under the principles of International Law . . . no State has the right to use its territory in such a manner as to cause injury by fumes or to the territory of another or the properties or persons therein when the case is of serious consequence and the injury is established by clear and convincing evidence" at p. 232. Of course reconnaissance activities do not measure up to this standard.
55. Art. 1 of The Outer Space Treaty of 1966.
56. Art. 2 of The Outer Space Treaty of 1966.
57. Art. 3 of The Outer Space Treaty of 1966.
58. Art. 4 of The Outer Space Treaty of 1966 and the various U.N. Resolutions on Space Law. See for example:
(a) Resolutions 1348 (XIII), Question of the uses of outer space 13th December 1959.
(b) Resolution 1962 (XVIII), Declaration of the Principles Governing the activities of States in exploration and use of outer space of 13/12/63.
(c) Resolution 2223 (XXI), Report of the committee on the peaceful uses of outer space of 19/12/1966.
(d) Resolution of 2453 (XXIII), International co-operation in the peaceful uses of outer space 20th December 1967.
59. Von der Heydte Loc. cit. p. 281.
60. Art. 3(4) U.N. Agreement Governing the Activities of States on the Moon and Other Celestial Bodies of Dec. 5, 1980 (Moon Treaty).

CHAPTER FIVE

THE POSITION OF PARTICIPANTS IN INTELLIGENCE GATHERING ACTIVITIES IN CONTEMPORARY INTERNATIONAL LAW

In this chapter, the focus is on the consequences for individuals participating in intelligence gathering activities and the protection International Law offers them. In the first part of this chapter, the position of these individuals in the Law of Armed Conflicts is examined while in the second part the position of these individuals in the Law of Peace is looked at. In part three, protection common to both peace and armed conflicts is examined.

5:1:0 THE POSITION OF PARTICIPANTS IN THE LAW OF ARMED CONFLICTS

5:1:1 Consequences for Those Involved in Intelligence Gathering Activities

In times of armed conflicts, two types of combatants exist. There are those combatants who upon capture by the enemy are treated as prisoners of war, and there are those who may be punished by the enemy upon capture. These latter combatants do not fulfil the requirements laid down by custom and convention for the status of prisoner of war. Participants in intelligence gathering activities in time of armed conflicts do likewise belong to these categories, depending upon the nature of the activity in which they are involved.

Spies, war traitors, and ordinary traitors belong to the category of unprivileged combatants, while those involved in wartime military reconnaissance are privileged combatants and must, therefore, be treated as prisoners of war upon capture.¹

Spies, in times of armed conflict, are not entitled to the status of prisoner of war.² The customary law of war permitted the belligerent against whom the spy worked to punish the spy with the death penalty if he so pleased.³ A benevolent captor would, sometimes in his discretion, impose a lighter punishment.⁴ The codifications of the Laws of War of the last half of the 19th Century laid down the rule permitting the punishment of spies by the offended belligerent, upon capture.⁵ Some of these codifications⁶, and the Hague Regulations of 1907, did not mention expressly the death penalty as the punishment for captured spies. In spite of this omission, belligerents continued to impose the death penalty on captured spies, on the basis of custom. The legitimacy of this punishment has now been put beyond doubt by the Geneva Conventions of 1949.⁷ As the Law of Armed Conflicts stands today, there is, therefore, no doubt that the maximum penalty for participants in espionage activity, during armed conflicts, is death.

Like spies, war traitors were not entitled to the status of prisoners of war. They, too, did not meet the legal qualifications of prisoners of war. Custom permitted the condemnation to death of captured war traitors, by the offended belligerents.⁹

The Geneva Conventions IV (civilians) of 1949 has altered this position. War traitors may now be treated differently, depending on whether they are captured in occupied territory or elsewhere. War traitors in occupied territory fall under the scope of Convention IV. Article 5 of the Convention provides that civilians involved in hostile activities against the security of the occupying power lose the rights and privileges provided for under the Convention. War treason is, of course, such a hostile activity. It is expressly provided that such persons lose their rights of communication, although they must be treated with humanity and granted a full and fair trial. Under Article 68 of the Convention, the belligerent occupant is given a right to punish persons engaging in hostile activities. Under that provision, it is provided that the death sentence may only be imposed on a protected person if he has involved himself in espionage activity, or in activities of serious sabotage against the installations of the occupying power, and of intentional offences which have caused the death of one or more persons if such offences were punishable by the law of the occupied territory before the occupation began. Since war treason, in as far as it relates to the gathering of intelligence, is not mentioned, and the death sentence is confined to the specific cases mentioned, then it follows that the death sentence no longer applies to war traitors who are solely involved in intelligence gathering activities. It would, therefore, follow that a war traitor will now only be punished with simple imprisonment or internment.

Since the provisions of Article 68 apply only to civilians in

occupied territories, in the absence of a conventional rule to the contrary, acts of war treason outside these areas remain regulated by customary International Law. The death sentence may, therefore, be imposed on the war traitor.

For the sake of clarity and in order to avoid confusion, it is necessary to reiterate that acts of war treason, such as sabotage and other forms of subversions, which are beyond the activity of gathering intelligence, are not covered in the foregoing treatment.

Ordinary traitors are no better treated than spies and war traitors under the Law of Armed Conflicts. Since the earliest times, punishment by death has been imposed on ordinary traitors in times of war.⁹ This practice was codified in the American Instructions of 1863.¹⁰ Modern texts say little about traitors. But there is nothing to suggest that the fate of traitors has improved. Municipal Laws, world-wide, still prescribe the death sentence for those who give aid and comfort to the enemy in time of war. Even in those countries in which the death sentence has been abolished, the possibility that it could be revived for traitors in wartime remains.

In time of armed conflict, those involved in reconnaissance activity are, unlike other participants in the intelligence gathering activities, entitled to the status of prisoners of war. This is because they fulfill all the requirements for that status under the Laws of Armed Conflicts. As prisoners of war, reconnaissance agents may not be tried for their legitimate acts as combatants, unless they have committed war crimes.¹¹

5:1:2

Protection of Participants in Intelligence
Gathering Activities in Armed Conflicts

International Law, through custom and convention, provides immense protection for prisoners of war. The fruits of this customary and conventional protection of prisoners of war have been concretized in the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (otherwise known as Convention III). The Convention's one hundred and forty-three articles provide for the protection of prisoners of war, with an emphasis on humane treatment, the conditions of living, their rights and obligations, and the termination of the status of prisoners of war. The Convention also provides for the establishment of agencies to implement the protection of prisoners of war. All in all, the Convention emphasises "the principle that the prisoner of war is not a criminal, but merely an enemy no longer able to bear arms, who should be liberated at the close of the hostilities and be respected and humanely treated while in captivity."¹² All these safeguards are enjoyed by reconnaissance agents. These agents, in comparison with other participants in intelligence gathering activities in time of armed conflict, are greatly favoured. There is little to add to the protection they enjoy, that is why more attention will be paid to the meagre protection provided by International Law to those other categories of participants in intelligence gathering activities.

Although International Law denies the participants in espionage, war treason and ordinary treason the status of prisoners of war, it does not leave them without any protection at all. It provides some

procedural and substantive safeguards, and in the case of espionage and war treason, immunity for completed acts. Further legal protection is found under the International Law of Extradition, whereas there also exist some extra-legal procedures for the protection of these persons.

5:1:2(a)

Legal Procedural Safeguards

The main procedural safeguard given by the International Law of Armed Conflict to spies, war traitors and ordinary traitors, is the requirement that before any such person is punished he must be given a fair trial.

The works of the early publicist do not mention this requirement of a fair trial. It is mainly mentioned in the works of the 19th and 20th Centuries. This is not surprising. It has been in these two Centuries that justice and fairness have been most lauded. Also in these two centuries, guarantees of judicial fair play have been firmly erected into the municipal legal systems. The rights of a man to a fair trial before he could be condemned was one of those guarantees which received the foremost acclamation.¹³

The rule that participants in intelligence gathering activities cannot be condemned in the absence of a fair trial, first developed in connection with espionage. This is because espionage was the best known of these activities. An early and elaborate trial of a captured spy was that of Major Andre, a British spy caught behind the American

lines during the Revolutionary War of Independence.¹⁴ The rule was subsequently expounded in the works of some of the leading Publicists.

Although the requirement for a fair trial for spies was not mentioned in the American Instructions of 1863, it was mentioned in subsequent codifications of the Laws of War. In the Russian Projet of 1874, Article 19 provided that a captured spy should be rendered to justice. This rule was eventually adopted by the Brussels Conference in its Declaration of 1874, as Article 20 which provided that a spy caught in the act would be tried and treated according to the laws in force in the army capturing him. At Brussels, it was urged that the requirement, that a spy be tried before punishment, was a minimum standard of humanity that any accused person was entitled to.¹⁵ In the Oxford Manual of 1880, Article 25 provided clearly that no person should be punished without a judicial authority pronouncing upon his case. The right to a fair trial for spies finally found expression in the form we know it today in the Hague Regulations of 1899 and 1907. The Regulations provided in Article 30 that: "A spy taken in the act shall not be punished without previous trial." This rule has subsequently been buttressed by subsequent treaties on the Laws of Armed Conflicts.¹⁶

While the right to a fair trial for spies had been heavily secured by international treaties, there were no conventional rules requiring a fair trial for war traitors and traitors. In the case of war traitors, custom required such a trial before they could be

punished. This much is clear from the war crimes trials after World War II.¹⁷ In the case of ordinary traitors, the situation remained that, in the absence of any customary or conventional rule, their only recourse would be to guarantees entrenched in municipal law.

In 1949, the right to a fair trial for participants in intelligence gathering activities received a boost from the signing of the Fourth Geneva Convention (Civilians). The boost did not benefit all participants, but only spies and war traitors. Ordinary traitors did not benefit by the Fourth Convention, because Article 4 of that convention provided that the Convention would only apply to protect persons who were in the hands of a power of which they were not nationals. Ordinary traitors, being persons working against the State of their nationality, could therefore derive no benefit from the Convention. Only in the case of participants in conflicts of an internal nature, was there a general guarantee of a right to a fair trial.¹⁸

Article 5 of the Fourth Convention imposes upon the parties, an obligation to treat persons, such as spies and war traitors, with humanity and not to deprive them of their rights to a fair and regular trial, whether they are caught in occupied territory or in the territory of the parties.

In case of acts of espionage or war treason committed in occupied territories, an impressive bill of rights is provided for, under Articles 64-76 of the Convention. This bill aims at safeguarding the rights to a fair trial.¹⁹ The provisions include the continued

application of the penal laws of the State whose territory has been occupied.²⁰ Information of charge,²¹ the right of defence by self or advocate,²² the right to appeal, and the right to petition for pardon or reprieve.²³ These provisions ensure that not only is a right to a fair trial granted, but that it is also full and meaningful.

The provisions in Part III, Section III of the Convention had a serious weakness. They protected only persons who were accused of hostile activities in occupied territories. This means that persons who carried on such activities in the territories of the parties outside the occupied territories were not protected thereby. The customary law, which did not have such an elaborate code, continued to apply.

Protocol I of 1977, Part IV, Section III, undertakes to remedy the problems of persons who are not beneficiaries of any other protection under the Law of Armed Conflicts. The Protocol guarantees the right to a fair and full trial, for both war traitors and spies outside occupied territory, and for ordinary traitors.

Protocol I, in the first place, did away with the exclusion of nationals from the protection of International Humanitarian Law, which had been made express in the Fourth Convention. The I.C.R.C. delegate, in considering the provisions of Part IV, Section III of the Protocol at the Diplomatic Conference, explained that the main shortcoming of the protection offered by Convention IV was to base its criterion of application on nationality. The intention of the new

provisions was to extend protection beyond the narrow criterion of nationality.²⁴ Nationals of a party to the conflict, who find themselves detained by such a power, for reasons connected with the armed conflict, are to enjoy certain minimum guarantees. The final version of Article 75, which was approved by the Conference and provides a whole range of minimum guarantees, applies those guarantees

"without adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth or birth or other status or on any similar criteria" (emphasis added)²⁵

Since the minimum guarantees offered by Article 75 apply without regard to nationality, even ordinary traitors are thereby protected.

During the discussions in the Conference of Article 75, it was suggested by the U.S. delegate and accepted by the Conference, that the provision would only apply to acts which were directly related to the conflict. Ordinary treason, or intelligence with the enemy, is such an act, and therefore, in case of ordinary treason, Article 75 must apply.

The Protocol has also improved the protection of persons, such as spies and war traitors, outside occupied territory who were not properly provided for, under the Fourth Geneva Convention of 1949. The Protocol categorically states that the rules laid down in Part IV, Section III, benefit all persons who do not benefit by any better treatment under International Law.

With regard to procedural guarantees under the Protocol, the

regular and fair trial for all persons charged with an offence in connection with an armed conflict. It provides that no person shall be found guilty of an offence, except pursuant to a conviction pronounced by an impartial and regularly constituted court, following recognized principles of judicial procedure. The article goes ahead to lay down some of the basic ingredients of regular procedure. These include: the need to notify the accused of his offence, the prohibition of collective punishments and retroactive criminal laws, the innocence of the accused until proved guilty, the principle against self-incrimination, the right to call witnesses and to examine those brought against the accused, the principles of autre fois acquit and autre fois convict, the principle of public trial and public judgment, and the right to legal advice upon judicial and extra-judicial remedies after conviction.

The provisions in the Geneva Conventions, and in the Protocol, are secured by the Provisions of Article 147 of the Fourth Convention, which ensures their implementation. That article provides that, it is a grave breach of the Convention, to willfully deprive a protected person of the right to fair and regular trial, prescribed in the Convention. This was a codification of the existing customary law. Any person who denied spies, or war traitors, the right to a fair trial, was guilty of a war crime. Such a person could be punished by any belligerent, into whose hands he fell.²⁶ Military Manuals of the leading nations have, for instance, mentioned specifically the killing of spies without trial, as a war crime.²⁷

5:1:2(b) Legal Procedural Safeguards Before the Courts of Law

The right to a fair and full trial for persons involved in intelligence gathering activities in times of armed conflicts has always been rigorously upheld by the courts. As early as 1872, a French Council of War punished a French General for ordering the summary execution of a spy.²⁸ It was not, however, until after World War II that courts of law attempted to repress the killing of spies and war traitors, or any other persons in time of armed conflicts, without giving them a previous trial.

The principle was stated emphatically in the case of Re List et al (the Hostages Trial).²⁹ The Court said:

"It is a fundamental rule of justice that the lives of persons may not be arbitrarily taken. A fair trial before a judicial body affords the surest protection against arbitrary, vindictive and whimsical application of the right to shoot human beings . . . "29a

Although that was a case of the shooting of persons in reprisal, the principle stated is one of general application, which applies to all those cases in which persons may suffer punishment for their warlike activities.

The right to a trial before punishment has been upheld even where a person has obviously been responsible for hostile activities. In the case of Re Flesch,³⁰ the Norwegian Supreme Court condemned Flesch for the murder of Norwegian citizens whom he had ordered to be shot without a trial being conducted to determine their guilt. The Norwegian citizens had been involved in activities hostile to the

German occupation forces. Judge Soelseth was of the view that it was a fundamental rule of Justice that nobody should be punished without a proper trial to establish his guilt.

The requirement of a trial is intended to guard against the use of the labels "spy", "war traitor", or "traitor", in order to punish innocent people. In the Second World War, the Nazi Dictator, Hitler's order that Allied airmen who were dropped behind the German lines should be shot on the spot, as they were spies, is a notorious example. In most cases, the airmen were regular soldiers involved in commando operations and would not legally qualify as spies. Several German Commanders carried out Hitler's orders and executed the airmen without any previous trials. After the war, Allied Courts condemned those Commanders for murder. Their defence that the airmen were executed as spies was of no avail. It was held that even if such men had been spies, their right to a fair trial provided for by the Hague Regulations was inviolable. Even the defence of superior orders from Hitler was rejected. Superior orders could not be a defence to the commission of war crimes. It was not beyond the capacity of an officer to refuse to implement an order that violated the Laws of War.³¹

There are also instances when individual commanders have ordered the execution of persons arbitrarily, on the grounds that they were spies or war traitors. In these cases, the courts have frowned on such abuses. In the case of Re Rhode et al,³² an example of such abuse can be found. Rhode and his co-accused executed, by lethal

drugs, four women belonging to the British Armed Forces. While it was alleged that these women were spies, they were never tried by a court of law. The accused's defence to the charge of murder of the women, that they were executed as spies, was rejected. It was held that even if the women had been spies, a trial, before they were executed, was mandatory under the Laws of War. The court went on to say that a trial is important even if, a spy has been caught in the act, because such a person might be able to raise some mitigating factor, or circumstance to this capital offence.

The case of Re Lippert³³ is another instance of a Commander using accusations of espionage to abuse his powers. Lippert was a Section Commander of Hitler's Waffen S.S. An order had been given, generally declaring the area of which Lippert was in charge a prohibited area. Lippert, of his own accord, increased the severity of the order. He ordered that any person found in the area would be deemed a spy and would be shot dead on the spot, without examining their defence or explanation. Pursuant to this order, several persons were shot in the area. After the war, Lippert was charged with the murder of these persons. Lippert pleaded the military situation of 1944, as a justification of his order. The Court was of the view that no military situation, however grave, would justify the indiscriminate shooting down of persons in a forbidden area. The Court went on to hold that, even if such persons had been involved in actual espionage, they had to be tried by a military court to determine their guilt, previous to punishment. Lippert was, therefore, found guilty of mass murder.

5:1:2(c)

The Nature of Procedural Guarantees
Given to Participants in Intelligence Activities

The requirement that a person involved in intelligence gathering activities be given a fair trial under the Law of Armed Conflicts is not a real protection for the spy who is caught in the act. It is a guarantee which is aimed at ensuring that only the real spies, war traitors, and traitors, are punished. The trial is intended to establish that, a person is a spy, a war traitor or an ordinary traitor. Once that is done, such a person faces an inevitable punishment. The requirement of a trial before punishment can, therefore, be regarded as a protection for persons, other than the actual participants in these activities, who may be accused of taking part in them.

5:1:2(d)

Minimum Substantive Safeguards

Karl Bluntschli, the Swiss Jurist, wrote:

"International Law completely rejects the right to dispose arbitrarily of individuals. It does not authorize either ill-treatment or violence against them."³⁴

These old principles of International Humanitarian Law have been accepted and codified in the several codifications of the Laws of War.

Whereas the Law of War has consistently refused spies, traitors and war traitors the status of prisoners of war, the Law continued to require that they be treated with humanity. Article 5 of the Fourth

Geneva Convention puts spies and war traitors beyond the protection of the Convention but, provides that such persons shall be treated with humanity.

The Convention and Protocol I of 1977 gives some content to the Principle of Humanity. They prohibit the imposition of cruel and degrading punishments, proscribe violence to life, limb or health of persons, and outlaw torture, or outrages, upon personal dignity (including rape, and forced prostitution).³⁵

The Laws of Armed Conflicts has taken particular care to protect women and children. Women, who find themselves in such a situation, are particularly well protected. They are to be housed in quarters separate from those of men, except when persons are detained as a family. To further ensure their security from personal violation, women are to be placed under the immediate supervision of women.³⁶

These minimum substantive safeguards ensure that even when persons are liable to be punished for their acts, they are to enjoy a certain amount of human dignity and respect.

5:1:2(e)

Immunity for Completed Acts

Acts of gathering intelligence are deemed complete when the participant gathers the information required and returns to the person sending him and delivers the information. It has become a rule of the International Law of Armed Conflicts that where a war traitor or a spy

has gathered intelligence and returned to the forces to which he belongs, should he subsequently fall into the hands of the power he worked against, he cannot be tried and punished for those completed acts. They can only be punished if they are caught before they have rejoined the ranks of their armed forces. The rule is based on the fact that, neither espionage nor war treason is an offence against the Law of Armed Conflicts. They are only punished because of the belligerent's need to defend himself from these dangerous activities, and in order to deter future spies. The creation of a permanent state of criminality for spies and war traitors would be inconsistent with the legitimacy of their acts. Moreover, the needs of self-defence cease, once the information has been put in the hands of the hostile army. To punish such persons would, therefore, be merely vindictive. In spite of its unhappy wording, a statement of the District Court in the case of ex Rel. Wessels³⁷ puts forward this rationale for the rule. The Court said:

"A spy may not be tried under International Law when he returns to his own lines, even if he is subsequently captured and the reason is that under International Law spying is not a crime and the offence which is against the Laws of War consists of being found during the war in the capacity of a spy."

Traitors have no such immunity. The 1929 British Manual of Military Law stated that:

"This immunity (of spies) for previous acts does not apply to persons guilty of treason, for they may be arrested at any place or any time. And, it is not necessary for traitors to be caught in the act in order that they may be punished."³⁸

* Traitors, unlike spies and war traitors, do not act lawfully in gathering intelligence. They are not only punished in self defence

and for deterrence, but also because of their breach of allegiance to their sovereign. For this breach of allegiance, the sovereign may arrest the traitor at any time and punish him. This position is defensible, in the realities of our times. So long as sovereignty remains a paramount consideration in the relations between States, there is no way the doctrine of treason can be gotten rid of, and this immunity extended to traitors.

The immunity of the returned spy and war traitor is an old rule of the Laws of War. General Halleck expounded it with ferocity. He reproached the Confederate authorities for punishing persons who carried out espionage in the South, but who had long returned to the Union armies, when captured in open combat on the battlefields. Halleck insisted they should have been treated as prisoners of war.³⁹

Article 104 of the American Instructions of 1863 stated this rule as applying to both spies and war traitors. When the rule was subsequently codified in other instruments, it did not mention war traitors. It mentioned only spies. The rule emphasising the immunity of the spy was included in the Russian Project of 1874, and was accepted by the Brussels Conference of 1874, forming Article 21 of the Brussels Declaration of 1874. The Oxford Manual of 1880 also adopted the rule. Finally, it found expression in Article 31 of the Hague Regulations of both 1899 and 1907. It provides:

"A spy who after rejoining the army to which he belongs is subsequently captured is treated as a prisoner of war and incurs no responsibility for his previous acts of espionage."

This rule has been accepted and reiterated in Article 46(4) of Protocol I of 1977, although that provision is limited to members of the armed forces who act as spies. Since the rule has found expression in the Protocol, it has been extended to cover all international armed conflicts, including war.

Since the American Instructions, the position of war traitors has not been subject to codification. The codifications have, however, never denied the immunity of the returned war traitor expressly or impliedly. There is also nothing in the writings of the jurists to suggest that the immunity of the war traitor no longer exists. In the absence of any dispute as to the existence of the validity of the immunity of the war traitor who has completed his acts, then it exists and is valid. Moreover, on the premise that a war traitor commits no offence against International Law by his acts, it would only be reasonable not to impose a permanent state of criminality upon him.

The best illustration of the working of this principle of immunity for completed acts is the French case of Re Reiger.⁴⁰ Reiger was a German national, who during World War II, was a reserve officer of the German army. Between 1941 and 1944, in civilian disguise, he organized espionage and intelligence networks in Southern and Northern France. He was later transferred to Denmark. After the War in 1946, he was arrested by the French Police and charged with espionage which he had organized during the war in France. At his trial and on appeal, Reiger invoked Article 31 of the Hague Regulations. The French Court of Cassation upheld his argument. It stated that having

successfully returned to his army, he was immune from prosecution for his previous acts of espionage.

The next issue to consider is the extent of this immunity. Immunity for previous acts seems to cover only acts of espionage or war treason. The immunity does not extend to other acts that may be criminal in se, in which the spy may have been involved. It has been said that a spy would be responsible for murder if, in trying to effect an escape, he kills a man.⁴¹

There is an important aspect in which the provision in Article 31 of the Hague Regulations is not clear. It speaks of a spy who returns to "the army to which he belongs." This tends to exclude civilian spies from the protection of Article 31 and only to protect military spies. A civilian does not belong to an army and therefore it would be difficult to envisage him rejoining "the army to which he belongs". This view has been taken by the Dutch Court of Cassation in the case of Re Flesche.⁴²

In order to resolve this issue, it is necessary to go back to the legislative history of Article 31. The American Instructions of 1863 contemplated the military spy, so did the Russian Project, and the Brussels Declaration, both of 1874. At Brussels, the German delegate refused any attempt to widen the interpretation of that provision to cover civilian spies. Civilians, he argued, could not be regarded as combatants. A formal interpretation was never adopted, and some jurists have been of the view that the question remained open.⁴³ The

question was particularly open where a civilian, in an area not as yet occupied by the enemy, enters the enemy's zone of operations and clandestinely gathers intelligence which he brings back to the army of his own State. Later, the area in which he lives falls into the hands of the enemy forces and he is captured. Was this person to be regarded as immune or to be tried for his previous acts of espionage?

This question cannot be appropriately answered from the provisions of Article 31. The customary law before 1874 is not helpful in resolving this issue. Even the 1977 Protocol I did not resolve it. In spite of the great width of Article 43 of the Protocol, which defines armed forces, instances like the one above, falls outside the concept. Such a civilian would not be regarded as a member of the armed forces, especially if he is a volunteer who seeks to benefit his country.

It may be said that Article 31 of the Hague Regulations favours the military spy and leaves the position of the civilian spy unclear. It is, therefore, necessary to adopt a new rule which provides expressly that a civilian spy or war traitor, who after completing his mission is subsequently captured by the enemy, should be treated as a civilian under the Fourth Geneva Convention of 1949 and incurs no responsibility for his previous acts of espionage or war treason.

5:1:2:(f) Consequences for Participants in Intelligence
Gathering Activities in Internal Armed Conflicts and
Their Protection in International Law

The Law of Internal Armed Conflicts is in its nascent stages. Just as the law lacks a concise definition of the various intelligence gathering activities, it also does not make clear the fate of those involved in intelligence gathering activities, in times of internal armed conflicts. In spite of this lack of conceptual precision, both Article 3, common to the Geneva Conventions of 1949 and Protocol I of 1977, have provided wide-ranging humanitarian safeguards for all persons involved in those conflicts.

Both instruments provide for the humane treatment of all those persons involved in the conflict, who for one reason or another, have fallen into the power of the hostile party.⁴⁴ In this regard, violence to life, health, physical or mental well-being, is prohibited. Murder and cruel treatment, such as torture, or humiliation, or any form of corporal punishment, are singled out as especially prohibited forms of punishment. Collective punishments, outrages against personal dignity, such as rape, forced prostitution, and any form of indecent assault, are also prohibited. Children and women are especially protected. With regard to persons whose liberty has been restricted, provision in the Protocol has been made to ensure that their health, well-being and personal beliefs, are respected.

Where persons participating in internal conflicts have fallen into the hands of the hostile party, and have been charged with a

criminal offence, both the Protocol⁴⁵ and common Article 3 provide certain procedural safeguards in the Courts of Law. These safeguards ensure that such a person, prosecuted for a criminal offence related to the conflict, shall be tried by a regularly constituted court, offering the essential guarantees of independence and impartiality. These safeguards include information of charge, right to legal defence, individual penal responsibility, prohibition of retroactive punishment, innocence until proof of guilt, right to trial in the presence of the prisoner, and prohibition of compelling the persons to testify against self.

Common Article 3, and the Protocol, also provide for the protection and care for sick and wounded participants, in these conflicts. Since these provisions cover all persons in internal conflicts, without any discrimination whatsoever, it may be said that today's International Humanitarian Law provides a wide-ranging protection for persons involved in intelligence gathering activities, not unlike that provided in International Armed Conflicts.

5:2:0

IN PEACETIME

5:2:1

Consequences for Participants in Peacetime Intelligence Gathering Activities

Although International Law does not prohibit peacetime intelligence gathering activities, States keen to protect their security have always taken punitive measures against individual

participants in these activities in order to suppress them. Municipal laws do always provide for the punishment of peacetime spies and reconnaissance agents. But, if there is no rule of municipal law declaring such activities an offence, International Law is of no help to the offended state as there is no offence known as peacetime espionage or reconnaissance in International Law.⁴⁷

Under Municipal Law, reconnaissance activities of various kinds are covered under very widely-defined offences. In some States they are also classed as espionage,⁴⁸ whereas in others they are called offences against official secrets.⁴⁹ The criminal law of States is territorial in character. It only punishes crimes which are committed within the territory of a State, except for international crimes which have been created by treaty such as hijacking of aircraft and piracy on the open seas, which do not have a territorial limit. This means, therefore, that only those activities of gathering information which are carried out within the state, and infringe the municipal law, may be punished. Punishment given for these activities will vary according to the provisions of municipal law, in various States. In some States, activities of gathering intelligence may earn the participant a death sentence, whereas, in other States, it may lead to imprisonment.⁵⁰ Imprisonment is, usually, for long periods of time. This is particularly shown by British practice in the matter.

The case of R. V. Fuchs⁵¹ is such an example. Karl Fuchs was an atomic scientist who had made a great contribution to the production of nuclear weaponry in World War II. He was of German origin, but due to Hitler's policies, he had fled to England in 1933. In 1942, on

account of his scientific contribution, he was made a British citizen. Between 1944 and 1947, following an ideological conviction, Fuchs passed to the U.S.S.R. priceless atomic secrets. He was arrested in the U.S.A. in 1947, and brought back to England, where he was charged with the violation of the U.K. Official Secrets Acts. He was sentenced to 14 years imprisonment. In passing the sentence, Lord Goddard C.J., said:

"I have now to assess the penalty which it is right I should impose upon you. How can I be sure a man of your mentality as shown in the statement you have made may not at any other minute allow some curious working in your mind to betray secrets of the greatest possible value and importance to this country. The maximum sentence parliament has ordained is 14 years and that is the sentence I pass on you."⁵²

In the case of R. V. Blake⁵³ a similar tendency of the courts to be severe is manifested. Blake had been an agent of the U.S.S.R. Secret Service from 1951 to 1959. He admitted having served for an ideological cause, and having passed every official document that came into his power to the Soviets. He was sentenced to a total of 42 years imprisonment, in which the terms were to run consecutively. He appealed against the severity of the punishment. At the appeal, Hilbery J. said:

"It is of the highest importance, particularly at the present time, that such conduct should not only stand condemned, should not only be held by all ordinary men and women in bitter abhorrence, but also receive when brought to justice the severest punishment."⁵⁴

This trend of reasoning is manifest in other British cases, where participants in intelligence gathering activities in peacetime were charged before the courts of law.⁵⁵

5:2:2

The Protection of Participants in Peacetime
Intelligence Gathering Activities

Diplomatic Protection: Under customary International Law, States protect their citizens in foreign States by way of diplomatic protection. Any injury done to the citizen by the foreign State in which he lives, to his person, or to his property, was deemed an injury to the State of his nationality. That State could, therefore, take diplomatic action to protect its citizen. It could protest, or seek redress from International Tribunals, or even take measures such as blockade.⁵⁶ The latter is now no longer legitimate, in view of the outlawry of the use of force, or threats to use force in international relations.⁵⁷

If it is conceded that states have a right in International Law to punish spies, and reconnaissance agents sent against them by other States, then there is no wrong it does to those individuals by punishing them. The sending State has no base upon which to exercise diplomatic protection. Diplomatic protection presupposes an injury done to the citizen, which is an injury to the State of his nationality. Moreover, it is the practice of States to disclaim their captured agents in foreign lands, showing their lack of interest in protecting them.

Even where a State acknowledges that it sent an agent to another State, it cannot exercise diplomatic protection. In the U-2 Incident, the U.S. acknowledged having sent Francis Gary Powers, the pilot, to

photograph the defence facilities of the Soviet Union. It went ahead to justify its action on grounds of self-defence for the West, but it did not contest the right of the Soviet Union to detain, try and punish Powers.⁵⁸

States will, however, exercise diplomatic protection if their citizens have been wrongly accused of carrying out intelligence gathering activities, or if such persons are detained by the target State for intelligence gathering activities, from without the territory of the target State. U.S. practice in this matter illustrates the point very well. On the 12th of January 1953, the forces of the People's Republic of China shot down a plane belonging to the U.S. Air Force. The Chinese claimed it was shot down within China's airspace, over the Liaoning Province of North East China. The U.S., on the other hand, counter-claimed that the plane had been found over the High Seas near Korea (where the plane was part of the U.N. Forces) before being led by Chinese fighters into North East China where it was shot down. The eleven members of the U.S. Armed Forces aboard the plane were arrested, tried and convicted for espionage under Chinese municipal law.⁵⁹ The U.S. protested the arrest, detention, trial and punishment of its nationals. As there were no diplomatic relations between U.S. and The People's Republic of China, the protest was made through the Swiss Government and the I.C.R.C. At the instigation of the U.S. delegation, the U.N. General Assembly passed a resolution condemning the Chinese action as a violation of the Korean Armistice Agreement. The General Assembly went further to request the U.N. Secretary General to seek the release of the detained persons.⁶⁰ The eleven persons were eventually released on 31 July 1955.

The RB47 Incident of July 1, 1960 was another instance when a State exercised diplomatic protection in favour of its reconnaissance agents. The RB47 was a U.S. reconnaissance plane carrying out electromagnetic reconnaissance off the Soviet coast. According to the Soviet Union's account, the plane was shot down inside Soviet waters and after disobeying an order to land. The U.S., on the other hand, claimed that the plane was at all times 30 miles away from the Soviet territorial waters, and was shot down after disobeying an order from Soviet fighters to escort it into Soviet waters. As a result of the shooting down of the plane, some of the crew were killed while the two survivors were detained in Soviet jails.

The United States protested the shooting down of the plane. It protested the killing of its nationals and the detention of the survivors. The issue was brought before the Security Council of the U.N.. A U.S. sponsored resolution condemning the Soviet action was vetoed by the U.S.S.R. The incident caused a deterioration in the relations between the two powers. The U.S.S.R. action was decried as a violation of the freedom of the High Seas. The two U.S. citizens were eventually released in January 1961.⁶¹

5:2:2(a) Protection Under International Human Rights Law

The Law of Peace does not lay down the specific legal safeguards for the treatment of captured participants in peacetime intelligence gathering activities. In this regard, it differs from the Law of Armed Conflicts in a major respect. The main legal, procedural and

substantive safeguards are, however, guaranteed by International Human Rights instruments which lay down minimum standards of treatment to be accorded by States to all human beings. These Instruments have become of great importance since 1945, and include the U.N. Charter, the Universal Declaration of Human Rights, the two U.N. Covenants on Human Rights of 1966⁶², and various regional instruments on Human Rights.⁶³ With these developments, it may be said, States are no longer free to treat their subjects, or persons within their power, the way they choose, within their municipal law.

Since intelligence gathering activities are often criminal activities under municipal law, the most vital safeguards to be considered here are those which relate to the judicial process that determines the criminality of activities alleged to have been committed by an individual.

International Human Rights instruments guarantee the right to a fair trial before a regular and impartial tribunal, before any individual can be condemned or punished.⁶⁴ Human Rights Law also prohibits retroactive criminal legislation⁶⁵, and recognizes the principles of autre fois acquit and autre fois convict.⁶⁶ The right of appeal to higher tribunals, and to seek pardon or clemency, are specifically provided for.⁶⁷

At the global and regional levels, international Human Rights instruments have set up bodies, whose duty it is to ensure that States comply with these instruments, and respect the fundamental human

rights of individuals.⁶⁸ These bodies have become the watchdogs for the liberty of the human being. In addition to these bodies, there are non-governmental bodies like Amnesty International and I.C.R.C., which ensure that persons in the power of a State, whether it is their own or not, are not mistreated.

Participants in peacetime intelligence activities who fall in the power of the State they are working against, therefore, benefit from the protection of International Human Rights Law. Their dignity and respect are strictly protected⁶⁹, and they may not be punished except by due process of the law.

5:2:2(b) The Use of Diplomatic Immunity As a Cover for Peacetime Intelligence Activities In International Law

The connection between diplomacy and peacetime intelligence gathering activities is a long one. Since their establishment on a permanent basis as lasting features of European diplomacy, embassies have always carried out, among other things, the function of intelligence gathering and processing. Intelligence gathering networks, with their nerve centres in the embassy, have been organized within the receiving State for a long time.⁷⁰ Embassy personnel involved in these activities have always been sheltered from the judicial process of the receiving state by diplomatic immunity.

International custom has for centuries accepted the inviolability of diplomats, their entourages and household.⁷¹ The purpose behind

this inviolability has been to permit the diplomat to fulfill his important duties without hindrance by the local authorities.⁷² The second reason is the respect given to the head of State of the sending state, whose representatives the diplomat and his entourage are.⁷³ The law relating to the immunity of diplomats has been codified by the Vienna Convention on Diplomatic Relations of 1961.

The Vienna Convention extends privileges and immunities to the members, staff and technicians of the diplomatic mission, vis-a-vis the receiving State. The staff and technicians of the mission enjoy only functional immunity (sometimes called qualified immunity). They are immune from local process only if they are doing an official duty. For acts outside their official duties, they may be prosecuted or sued. It has been held in the U.S.A. that acts of intelligence gathering in violation of municipal espionage law are not official duties and therefore functional or qualified immunity cannot protect a person accused of having committed those activities.⁷⁴

Diplomatic agents, or members of the mission, on the other hand, enjoy full immunity from local process. This immunity continues to be valid until it is waived by the sending State. These immunities enjoyed by diplomatic agents, and exceptions thereto, have been laid down in the Vienna Convention. Exploiting these immunities, members of diplomatic missions have organized intelligence gathering networks in the receiving States, without fear of local process.

Under the Vienna Convention, a diplomatic agent or a member of a diplomatic mission enjoys several rights. His person is inviolable and the receiving state shall take all measures to protect him.⁷⁶ His residence is likewise inviolable.⁷⁷ He is immune from local criminal jurisdiction. Immunity from the local civil jurisdiction is qualified. In matters that involve him personally as a legatee, executor, administrator or heir, he has no immunity. In official matters he retains his immunity.⁷⁸ One of the main ways in which diplomats have made use of these immunities is to collect intelligence about the receiving state.

In addition to these privileges and immunities enjoyed by the diplomat, there are immunities and privileges which attach to the mission itself. These privileges encourage the clandestine intelligence gathering activities of the diplomatic staff. The Vienna Convention makes the premises of the embassy inviolable.⁷⁹ The mission is guaranteed the freedom of communication by using cipher or code or courier with the sending State. Couriers are given special protection whereas official communication of the embassy is inviolable and the diplomatic bag must not be opened.⁸⁰

As a result of the privileges given to diplomatic agents, there have been constant disputes in the courts of law as to who is a diplomat. Under the Vienna Convention, a diplomatic agent is defined as the head of the mission or a member of the diplomatic staff of the mission.⁸¹ They are in this way distinguished from other staff of the mission and technicians. In the U.S., recent cases have suggested

that a person will only be regarded as a diplomatic agent if he is designated as such by the sending State, and received in that capacity by the receiving State.⁸² On the basis of this reasoning, courts of law have rejected the plea of diplomatic immunity by Soviet citizens who were designated diplomats by the U.S.S.R., but were working in the U.S.A. as employees of international organizations. These employees were charged and convicted of espionage, contrary to U.S. law, for having attempted to steal vital information from that country. These cases show a general consensus that these persons did not enjoy diplomatic immunity from the judicial process in U.S. courts, since they were not the diplomatic agents of the U.S.S.R. to the U.S.A..⁸³ The Courts conceded, however, that as employees of international organizations, they could have invoked functional or qualified immunity. Functional immunity being unable to bar a prosecution for espionage, as that activity is not part of the functions of an international organization, would have been of no avail to the individuals concerned. Employees of international organizations may, however, have full immunity, if there are treaties granting such immunity, or if there are municipal laws providing to that effect. The Secretary General of the U.N., and his immediate assistants, for instance, enjoy full diplomatic immunity.⁸⁴

The total effect of the law relating to diplomatic immunities, on persons involved in intelligence gathering activities, is that if a properly qualified diplomat is involved in that activity, he cannot be subject to local criminal jurisdiction, even if his activities amount to a crime in municipal law. In order for States to protect

themselves from the activities of diplomats who abuse their privileges and immunities in this manner, such diplomats are always declared persona non grata by the receiving State, when they are identified. Thus, they are expelled from the receiving State.

The protection offered by diplomatic immunity to peacetime intelligence gathering agents, from criminal prosecution, is total. This is so, if the person concerned fully qualifies as a diplomat. This protection is, however, limited to only a very small number of those involved in the intelligence gathering business. The majority of these persons are citizens of the target State who remain exposed to criminal prosecution and penalty.

5:3:0 PROTECTION COMMON TO PEACE AND ARMED CONFLICT

Although it has been said that the phenomenon of armed conflict is contrary to peace,⁸⁵ there are procedures for protection of persons involved in intelligence gathering activities which are common to both phenomena. Here, the laws relating to extradition, and the use of extra-legal protection procedures, are cases in point.

5:3:1 The Law Relating to Extradition and the Protection of Participants in Intelligence Gathering Activities

In international practice, criminals may be extradited from one State to another, to answer for their crimes. In some countries, whether or not a criminal will be extradited will depend upon the

existence of an extradition treaty, and its provisions. In others, it will depend upon the willingness of a State to extradite the criminal. No customary rule of International Law compels a State to extradite criminals.⁸⁶

Extradition treaties, in general, provide for the extradition of common criminals. They exempt political offenders from extradition. even where a treaty is not required to extradite, political offenders are generally exempted from extradition. Specific treaties may, however, be made to extradite particular cases of political offenders. The most famous of such treaties are those between Allied Powers at the close of World War II which provided for the extradition of war criminals and those who had collaborated with the enemy (traitors).⁸⁷

Persons involved in intelligence gathering activities, whether in time of armed conflict or peace, are regarded as political offenders, and, by general international practice, cannot be extradited for those activities. M.C. Bassiouni, who has written on International Extradition, has said: "Treason, sedition and espionage are offences ^{against} directed / the State itself and are therefore, by definition a threat to the existence, welfare and security of that entity and as such they are purely political offences."⁸⁸

Although the author does not mention other intelligence gathering activities, such as war treason and peacetime reconnaissance, he nevertheless makes his point. Being "purely political offences", the offender cannot be extradited.

The Law of Extradition provides a valid protection when a participant in intelligence gathering activities has fled his country and gone to another. He may not be extradited from there in the absence of a special treaty. This principle is well illustrated by the case of Anonymous (Denmark Collaboration with the Enemy case).³⁹ Denmark requested the extradition of certain of its nationals living in Brazil. During the war, these nationals had collaborated with the German occupation forces. After the war, they were convicted of treason by the Danish Courts, before escaping to Brazil. Refusing the extradition request, the Brazilian Supreme Court explained that their offence was a political one. It stated:

"The crime with which the accused is charged is that of collaboration with the enemy who was then in occupation of their country . . . The crime of assisting the enemy in time of war is a political crime . . . lato sensu because it is a crime against the State in its supreme function namely its external defence and its sovereignty."⁹⁰

While the law relating to extradition protects such an offender, it is still possible that the State seeking his extradition may be able to have him brought into its power through extra-legal measures. These include deportation from the State of refuge, and abduction (the latter being unlawful, if done in violation of the host State's sovereignty).

5:3:2

Extra-Legal Protection of Participants in Intelligence Gathering Activities

In times of both peace and armed conflict, intelligence organizations and States have devised elaborate extra-legal protection

for participants in intelligence gathering activities. The main procedures here include training, evacuation, defection and exchange.

When intelligence gathering activities involve human beings as the prime actors, they operate in extensive human networks. The capture of one agent would not only jeopardize the entire operation, but also endanger the other agents. This means, therefore, that intelligence gathering organization must strive to ensure the safety of its operatives. The first step in the protection of an operative is to train him to avoid detection and capture. Means of procuring the required information, and communicating it to its destinataires, are taught to the agent in the minutest details. In addition to these, the agent must be taught in an elaborate fashion the security measures he must take to protect himself, and those he has to deal with, in the course of business, from identification. The agent must be taught how to detect counter-intelligence surveillance, especially, to identify the traps that are set for him.⁹¹

If the agent detects that he is in danger of being arrested for his activities, he has to inform his employers. The employer may then evacuate him to a safer place beyond the jurisdiction of the target State. An example of such an evacuation is that of the two British diplomats, Burgess and Maclean. The two diplomats had served the Soviet Secret Service by providing information about the West. When they were in danger of being captured, they were evacuated to safety in the U.S.S.R. The Soviets repeated the same feat when they evacuated Kim Philby, another British diplomat and intelligence officer in 1963.⁹²

A third protection procedure for participants in intelligence gathering activities is that of defection. This is very much like evacuation. Both in times of peace and armed conflict, agents involved in this process when they are endangered, are encouraged to defect to their employers. The defection of Eastern Block diplomats in time of peace, to the West, is a case in point here.

The other procedure is the exchange of agents, if they have been captured by the States they are working against, tried and imprisoned, or condemned to death (but before the execution is carried out). The practice of exchanging agents, especially spies, is a very old one. Article 103 of the American Instructions of 1863, specifically mentions the need for a special cartel for the exchange of war traitors and spies between belligerents. Today the exchange of agents involved in intelligence gathering has become an important daily international activity. Much of this activity of exchange goes on in secret. It goes on unnoticed, but a few incidents have surfaced above this veil of secrecy. The U-2 pilot, Francis Gary Powers, who was captured by the Soviets, was exchanged for Col Abel, a Russian spy who had been arrested in the U.S.A.⁹³ The Soviet spy, Gordon Lonsdale alias Konon Trofimovich Molodi, was exchanged for the British businessman, Grenville Wynne, in 1964.⁹⁴

5:4:0

A Summary of This Chapter

International Law permits States to punish those who participate in the activities of espionage, ordinary treason, and war treason in

time of armed conflicts. Persons involved in reconnaissance activities, in times of armed conflict, are treated as prisoners of war, if they should fall under the power of the other party to the conflict.

Although International Law makes spies, traitors and war traitors unprivileged combatants, it does not leave them without any protection. International Humanitarian Law now provides them with certain substantive and procedural safeguards, even if they are to be punished. In these safeguards, their inherent dignity and respect as persons is assured.

A further safeguard for spies and war traitors is their immunity from prosecution for completed acts. This immunity is still insufficient, since it does not extend to civilian spies and war traitors. Immunity for completed acts is based on the fact that the activities of spies and war traitors are not criminal. Punishment is merely in self-defence of the offended belligerent. Since treason imports a criminal breach of allegiance to the sovereign, immunity does not extend to it.

In the Law of Peace, International Law does not prohibit the punishment of participants in intelligence gathering activities, and where municipal legislation so provides, they are punished. The Law of Human Rights ensures that persons involved in these activities are not mistreated, and that they are entitled to procedural safeguards before the courts of law, and substantive rights, elsewhere. While States do not provide diplomatic protection to participants in

intelligence gathering activities, in peacetime, they protect those of their citizens who are wrongly accused of being involved in such activities, or those who were involved in such activities beyond the territory of the target State.

There is also protection which is common to both the Law of War and the Law of Peace. Both peacetime and wartime participants in intelligence gathering activities benefit from the law of extradition. As political offenders, they cannot be extradited for their activities, in the absence of a special agreement between two states.

Extra-legal protection of participants in intelligence gathering activities is often resorted to, both in peacetime and times of armed conflicts. Measures of extra-legal protection include training, evacuation, defection, and exchange of agents captured by rival States.

All these legal and extra-legal protections of participants in intelligence gathering activities, have ensured that the status of the spy, traitor, war traitor or reconnaissance agent, is no longer as precarious as it used to be. This is a trend in line with the general developments of International Humanitarian Law, and International Human Rights Law - the main contemporary currents that are shaping International Law.

FOOTNOTES

1. Article 29 of the Hague Regulations of 1907.
2. This is clear from the general provisions on espionage in the Hague Regulations, Article 29-31.
3. Oppenheim; International Law - A treatise, Vol II, (London, Longmans 1952) Seventh Edition by H. Lauterpacht at p. 424.
4. Ibid., p. 424.
5. See the American Instructions of 1863, Art. 88, Brussels Declaration of 1874, Art. 20, Oxford Manual, Art. 25, Hague Regulations of 1907, Art. 30.
6. In the Brussels Declaration and the Oxford Manual, it was not mentioned at all.
7. Art. 68 of Convention IV.
8. Oppenheim op. cit. (first Edition 1906), at p. 270.
9. The English Treason Act of 1301 is an example.
10. Art. 91 of the American Instructions of 1863.
11. Bernhardt (ed) Encyclopaedia of Public International Law. Vol. 3, Amsterdam, North Holland Publishing Co., 1982,) p. 279.
12. I.C.R.C., The Geneva Conventions of August 12, 1949. (Geneva, I.C.R.C., 1970 Reprint) introduction at p. 12.
13. The process had begun earlier at the end of the 18th Century. See Art. 7 of the French Declaration of the Rights of Man and the Citizen, 1789.
14. Halleck: "Military Espionage" (1911), Vol. 5, A.J.I.L. 590 at pp. 514-603.
15. Huybrechts, G., "Espionage et Convention de La Haye". Revue de Droit Penal et de Criminologie (1951), Vol. 31, pp. 928-949 at p. 936.
16. Geneva Convention IV, Article 5 and 68. Protocol I of 1977, Art. 46 and 75.
17. Re Sandrock et al, 13 I.L.R. 297. Re List et al, 15 I.L.R. 632. Re Flesch, 14 I.L.R. 307. All discussed infra.
18. See common Article 3 of the Geneva Conventions of 1949.
19. Article 71.

20. Article 64.
21. Article 71.
22. Article 72.
23. Article 74.
24. Official Records of the Diplomatic Conference on the Re-affirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva 1974-1977. (Bern Federal Political Dept., 1978,) Volume XV, pp. 25-27.
25. Article 75(1).
26. Oppenheim op. cit. at p. 566.
27. U.S. Army and Field Manual, Washington Defence Department 1956. Para 504(L).
28. Huybrechts, G.: Loc. cit., pp. 934-935.
29. (1948) 15 I.L.R. 632.
- 29(a). at p. 645.
30. (1947) 14 1 I.L.R. 297.
31. Re Dostler (1948) 15 I.L.R. 280. Re Von Falkenhorst (1946) 13 I.L.R. 282. Re Buck et al (1946) 13 I.L.R. 293. Re Schonfield et al (1946) 13 I.L.R. 299. Re Sandroock et al (1946) 13 I.L.R. 297.
32. (1946) 13 I.L.R. 294.
33. (1950) 17 I.L.R. 432.
34. Quoted by Pictet, Jean; The Principles of International Humanitarian Law, (Geneva, I.C.R.C. 1966,) at p. 31.
35. Geneva Convention VI of 1947, Article 76 and Protocol I of 1977, Articles 75 and 76.
36. Protocol I of 1977, Articles 76 and 77.
37. (1919-1922) 1 A.D. case No. 298, p. 431.
38. British Manual of Military Law 1929, p. 298, para 172.
39. Halleck Loc. cit., pp. 593-594.
40. (1948) 15 I.L.R. 483.
41. British Manual op. cit., pp. 297-298.
42. (1949) 16 I.L.R. 266 at pp. 271-272.

43. Huybrechts G., Loc. cit., pp. 938-942, particularly at p. 939.
44. Common Article 3 of the Geneva Conventions of 1949, Articles 4, 5, and 6 of Protocol II of 1977.
45. Art. 6 of Protocol II of 1977.
46. Art. 2 of Protocol II of 1977.
47. Schmidt Marquadt V Director of Prosecutions (1949) 16 I.L.R. 405.
48. See U.S. Espionage Acts, 18 U.S.C. 5793 1976 and 18 U.S.C. 5794.
49. Official Secrets Act Cap. 187, Laws of Kenya.
50. The Official Secrets of Kenya Cap 187. Laws of Kenya provides for imprisonment while the U.S.S.R. "Law on Criminal Responsibility for State crimes." Art. 2(4) provides for the punishment of death.
51. The Times, March 1950 footnoted in [1961] 3 All E.R. 127.
52. at p. 127.
53. [1961] All E.R. 125.
54. at p. 128.
55. See R.V. Oakes [1959] 2 All E.R. 92. Also R. V. Britten [1969] 1 All E.R. 517, and R.V. Bingham [1973] 2 All E.R. 89.
56. Several cases decided by the I.C.J. were brought by States on behalf of their citizens. See for example the Nottebohm case (1955) I.C.J. Reports, p. 4, Anglo-Iranian Oil Co. case, 1952, I.C.J. Reports, p. 93.
57. Article 2(4) of the U.N. Charter.
58. O. Lissitzyn: "Some Legal Aspects of the U-2 and RB47 Incidents" (1962) 56 A.J.I.L. 135.
59. Yao Lun, Military Procurator of the Supreme Peoples Procuratorate V Arnold et al, Vol 47 I.L.R. 109.
60. Resolution 906 (IX) of 1954 of the General Assembly in Dusan Djonvich (Ed) United Nations Resolutions, Series I, Volume V (1954-1956) (New York, Oceana 1973,) p. 172.
61. Lissitzyn supra note 58.
62. The International Covenant on Economic, Social and Cultural Rights 1966, and The International Covenant on Civil and Political Rights of 1966..

63. The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. The American Convention on Human Rights 1969. The African Charter on Human and Peoples Rights of 1981.
64. Articles 10 and 11 of the Universal Declaration, Rights Covenant of 1966, Article 8 of the American Convention and Article 2 of the European Convention.
65. Article 15 of the Civil and Political Covenant, Article 7 of the European Convention, Article 9 of the American Convention.
66. Article 14(6) and 14(7) of the Civil and Political Covenant. Article 8(4) of the American Convention.
67. Article 14(5) of the Civil and Political Covenant, Article 14(6) of the American Convention.
68. The establishment of the Human Rights Committee under the Civil and Political Covenant, Part IV. The European Commission of Human Rights under Article 19 of the European Convention of 1950. The Inter-American Commission on Human Rights under the 1969 American Convention.
69. Article 3 of the European Convention, Article 5 of the American Convention and Article 7 of the Civil and Political Covenant.
70. Copeland M., The Real Spy World, (London, Weidenfeld & Nicolson 1974) Chapter 3.
71. Oppenheim op.cit. Vol. I Peace (8th Edition) pp. 788-790.
72. Wood J.R., and Serres J., Diplomatic Ceremonial and Protocol, (London, McMillan 1970) p. 47.
73. Oppenheim, op.cit. (peace) (8th Edition) at p. 789.
74. U.S. V Egorov 222 F Supp 106, U.S. V Coplon (1949) 84 F Supp 472. See also Caccamo J., "A Comparison and Analysis of Immunities Raised by Soviet Nationals Indicted Under U.S. Espionage Laws" 1980 Volume V, Brooklyn Journal of International Law, no. 2 at p. 272.
75. Wood and Serres op. cit. p. 47.
76. Art. 29.
77. Art. 30.
78. Art. 31.
79. Art. 22.
80. Art. 27.

81. Art. 1(e).

82. Supra note 74.

83. Ibid.

84. Convention on the Privileges and Immunities of the U.N., Article 5. The U.N. Headquarters Agreement, Article 5.

85. Krzystof Skubiszewski, In Bernhardt Encyclopaedia op. cit. Vol. 4, p. 77.

86. Shearer I.A., Extradition in International Law, (Manchester, University Press, 1971) p. 28. He explains that common law countries ordinarily require treaties to extradite. Other countries may extradite if they are willing to do so and if their laws do not require a treaty. At p. 24, he makes it clear that International Law does not impose a duty on States to extradite criminals.

87. See the case of Re Flesche (1949) 16 I.L.R. 265 where a Special Agreement between the U.K. and the Netherlands to extradite war criminals was an issue.

88. Bassiouni, M. Ch., International Extradition and World Public Order. (Leyden, Sijthoff/Oceana 1974) at p. 332 and also Dr. Christine Van den Wijngaert: The Political Offence Exception to Extradition, (Kluwer, Deventer, 1980) pp. 105-106.

89. (1947) 14 I.L.R. 146.

90. Ibid. at pp. 146-147.

91. Copeland M. op.cit. pp. 317-318.

92. Fitzroy Maclean, Take Nine Spies (London, Weidenfeld & Nicolson,) pp. 222-227 at pp. 239 and 265 respectively.

93. Dulles, A., (Ed) Great True Spy Stories, (New York, Harper and Row), foreword, p. (XI).

94. Fitzroy Maclean op. cit. p. 301.

CHAPTER SIX

SUMMARY AND CONCLUSIONS

In the daily conduct of their international relations, States require intelligence about other States they are dealing with. For this reason, States commission activities to acquire the necessary intelligence. Some intelligence gathering activities are secret and of clandestine character, whereas others are overt. States have undertaken these activities since time immemorial. The history of these activities shows that they have always changed, in accord with the current needs of the State, and its material condition in different ages and different societies. States have, in the contemporary world, moved from the absolute reliance upon human agents, to rely increasingly upon scientific instrumentalities based on land, on the seas, in the air and in outer space.

In its development, International Law has always shown concern for intelligence gathering activities. The earliest publicists showed concern for the activities of spies and ordinary traitors, in times of war. The distinction between the two activities was mainly based on the criterion of nationality. Traitors were nationals, spies were not. The doctrine of war treason emerged to cover all those activities which were not covered by the concept of espionage and ordinary treason, in the field of intelligence gathering, in war time. At the same time, the concept of reconnaissance in war emerged to cover those

activities of gathering intelligence which were carried out by troops in uniform. These concepts have now, happily, been extended to all international armed conflicts, the most common types of conflict in our contemporary world. This has been the effect of Protocol I of 1977. Unhappily, however, these concepts have not been elaborated in the International Law of internal conflicts. The law relating to the latter type of conflicts is but in its nascent stages, and it is desirable that the law relating to intelligence gathering activities, developed for international conflicts, should be extended to internal conflicts, as well.

In time of peace too, International Law regulates intelligence gathering activities. Misplaced moral considerations hampered the development of the law in this area. The contemporary notoriety of intelligence gathering activities in peacetime has led to the emergence of the concepts of peacetime espionage and reconnaissance. These concepts now cover these activities adequately.

The continuing adjustment of International Law to these changing needs of society, in the field of intelligence gathering, and to the changing technology and technique of the activities, can only be seen as a clear expression of the dynamic character of the Law of Nations.

While there has been an extensive debate on the issue, in the foregoing study, it has been made clear that International Law does not prohibit States from commissioning intelligence gathering activities against other States, either in times of armed conflict or in

peace. In times of armed conflicts, these activities are expressly permitted by International Law. On the other hand, International Law in times of peace does not prohibit States from deploying such activities. In the absence of such an express prohibition, International Law then permits these activities. The legality of these activities, in themselves, must be distinguished from the illegality of other activities, with which they may be associated. Intelligence gathering activities associated with war crimes, in times of armed conflict, or with a breach of the territorial sovereignty of the target State in peace, are infractions of International Law, because of the collateral illegality involved. A State may, therefore, only protest under International Law, if intelligence activities commissioned against it, involve an independent breach of International Law.

Just as International Law does not prohibit intelligence gathering activities, it, as well, does not prohibit the target State from punishing individuals participating in those activities, should they fall in its power. By International Law and practice, some participants are punished, while others are not. In the Law of Armed Conflict, reconnaissance agents are treated as prisoners of war, while spies, ordinary traitors and war traitors are subject to punishment with death, if the capturing party so pleases. Punishment is justified on grounds of the belligerent's right to self-defence and in order to deter future agents. The activities of espionage and war treason are not regarded as crimes, because International Law permits them. Ordinary treason also may be used by one State against another, for securing the required intelligence, but as the citizen who

betrays his State to the enemy commits a criminal breach of allegiance, he is a criminal. He is punished as well for the criminality of his acts.

In a world where State sovereignty still reigns supreme, it is difficult to urge a different position for the ordinary traitor in war. However, a lot may be said in favour of spies and war traitors. The death sentence for these persons is repugnant to contemporary developments in the Laws of Armed Conflicts - the humane treatment of individuals, and the sparing of life as far as possible. If spies and war traitors were punished, in self-defence, with death, it can as well be argued that the needs of self-defence may be served by the detention, incommunicado, of such dangerous elements, for the duration of an armed conflict.

The other reason advanced for the punishment, with death, of spies and war traitors, was that of the need to deter others who may want to serve in that capacity. It is argued, here, that this reason is not valid. So long as States need intelligence about others, they will send secret agents. Intelligence is indispensable to the conduct of war.

Another pointer towards the invalidity of the argument of self-defence and deterrence, as a justification for the punishment of spies and war traitors, is that reconnaissance agents who are involved in similar activities are not punished, but are instead treated as prisoners of war. The only reason for this distinction is that

military reconnaissance agents in war distinguish themselves as combatants, by using their legitimate uniforms in the activity, and must therefore be accorded the full privileges of combatants. If this is true, it follows, therefore, that spies are punished for failing to distinguish themselves as combatants. In a world where the status of privileged combatants is gradually extending to all participants in armed conflicts, it is only fair, that, spies and war traitors be recognized as privileged combatants. If this is done, then the Law of Armed Conflict ~~will~~ have gone a long way to recognize the realities of our day - that war cannot be fought without accurate intelligence, and that those involved in its collection should be treated as equals of those who actually do the fighting.

The Law of Peace does not grant any permission to States to punish persons involved in peacetime intelligence gathering activities. It does not prohibit such punishment. Municipal law has always provided for the punishment of these activities. If these activities are not offences against International Law and yet are punished by States, the only justification can be found in the need for States to preserve their independence and sovereignty.

While spies, war traitors and ordinary traitors are unprivileged combatants in time of armed conflicts, International Law provides them with some procedural and substantive safeguards, when they are in the power of the hostile party. They are entitled to a fair and regular trial, before they can be punished. In addition, they are entitled to humane treatment, respect and dignity due to their persons, while in

captivity. Spies and war traitors are also immune from prosecution and punishment for their acts, if they have completed their activities and returned to the army employing them. This protection evidently covers only military personnel and does not extend to civilian persons involved in those activities. A rule to cover civilians as well is necessary, if the immunity is based on the fact that neither spies nor war traitors are war criminals, but are simply unprivileged combatants.

In time of peace, participants in intelligence gathering activities who fall into the power of the State they are working against, have as well procedural and substantive safeguards under International Law. These have been provided by the development of the International Human Rights Law since 1949. In addition, where the nationals of a State are wrongly prosecuted for carrying out such activities in another State, the State of their nationality may exercise diplomatic protection in their favour. Diplomatic protection is also exercised where a State prosecutes persons who have carried out intelligence activities without any collateral breach of International Law. Otherwise, States do not normally seek to exercise protection for peacetime spies, and reconnaissance agents who are in breach of other rules of International Law. The laws safeguarding diplomatic immunity have also been used in time of peace, as a cover for intelligence gathering activities, and the protection of agents involved.

In both armed conflicts and in times of peace, the law relating to extradition provides an important protection to persons participat-

ing in intelligence gathering activities. They are regarded as political offenders, and cannot be extradited for their activities. Another protection in both armed conflicts and peace, is the use of extra-legal safeguards. Training, evacuation, and exchange of agents are practical and effective means of protection.

While intelligence gathering activities between States have, for a long time, loomed in the twilight of International Law, from this study it is shown that International Law is now bringing these activities into its full glare. International Law and practice have developed veritable legal norms, relating to these activities. These activities have been defined by International Law. In the wake of modern developments in the Humanitarian Law of armed conflicts, and the International Law of Human Rights, it may, happily, be said that, gone are the days when those involved in intelligence gathering activities were regarded as outlaws and outcasts, subject to summary treatment.

A lot more needs to be done to rehabilitate the participant in intelligence gathering activities, to his full rights, as an indispensable factor in the relations between States.

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