

## **“ABSOLUTE FRIENDS”: UNITED STATES ESPIONAGE AGAINST GERMANY AND PUBLIC INTERNATIONAL LAW**

Patrick C. R. Terry

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### Article abstract

Since 2014, the USA stands accused of engaging in espionage against Germany, a NATO partner and supposedly close ally. Many, though by no means all of these allegations became known because of the Snowden revelations. In Germany, this has led to a public backlash and has caused many to criticize the German government’s feeble reaction. Against this backdrop, this article considers whether the alleged US conduct may have even gone beyond abusing Germany’s trust by actually violating public international law. After summarizing the main accusations, the state of the debate on the legality of espionage in international law will be analysed. This will allow the conclusion that there is so far no convincing answer to the question of whether espionage violates public international law or not. This is due to the imprecise, contradictory and changing definitions of the term “espionage”, but also, more importantly, to the fact that there is no necessity for international law to deal with “espionage”. Rather, customary international law already provides clear guidance as to the lawfulness or unlawfulness of most, if not all, activities commonly associated with espionage. A detailed legal analysis of the alleged US spying activities will confirm this proposition and reveal that US conduct, if proven, did indeed violate public international law in each case. The USA not being able to rely on any legal justification for its actions, Germany would consequently be well within its rights to adopt countermeasures.

# “ABSOLUTE FRIENDS”<sup>1</sup>: UNITED STATES ESPIONAGE AGAINST GERMANY AND PUBLIC INTERNATIONAL LAW

*Patrick C. R. Terry\**

Since 2014, the USA stands accused of engaging in espionage against Germany, a NATO partner and supposedly close ally. Many, though by no means all of these allegations became known because of the Snowden revelations. In Germany, this has led to a public backlash and has caused many to criticize the German government's feeble reaction. Against this backdrop, this article considers whether the alleged US conduct may have even gone beyond abusing Germany's trust by actually violating public international law. After summarizing the main accusations, the state of the debate on the legality of espionage in international law will be analysed. This will allow the conclusion that there is so far no convincing answer to the question of whether espionage violates public international law or not. This is due to the imprecise, contradictory and changing definitions of the term “espionage”, but also, more importantly, to the fact that there is no necessity for international law to deal with “espionage”. Rather, customary international law already provides clear guidance as to the lawfulness or unlawfulness of most, if not all, activities commonly associated with espionage. A detailed legal analysis of the alleged US spying activities will confirm this proposition and reveal that US conduct, if proven, did indeed violate public international law in each case. The USA not being able to rely on any legal justification for its actions, Germany would consequently be well within its rights to adopt countermeasures.

Depuis 2014, les États-Unis sont accusés de se livrer à des actes d'espionnage contre l'Allemagne, un partenaire de l'OTAN et un allié supposément proche. Plusieurs de ces allégations, quoique non pas toutes, furent découvertes en raison des révélations de Snowden. En Allemagne, cela a mené à de vives réactions du public ainsi qu'à des critiques de la réaction du gouvernement allemand, jugée trop faible. Dans ce contexte, cet article analyse la question de savoir si, au-delà de l'abus de confiance envers l'Allemagne par la réalisation de ces actes américains allégués, ces derniers ont en fait constitué une violation du droit international public. Suite à un résumé des accusations principales, l'état du débat sur la licéité de l'espionnage en droit international sera analysé. Cela permettra la conclusion qu'il n'y a à ce jour aucune réponse convaincante quant à la question de savoir si l'espionnage viole le droit international public ou non. Cela résulte du fait que les définitions du terme « espionnage » sont imprécises, contradictoires et changeantes, et également, de façon majeure, du fait qu'il n'existe aucune nécessité pour le droit international d'aborder l'« espionnage ». Plutôt, le droit international coutumier offre des directives claires quant à la licéité ou l'illicéité de la plupart des activités généralement associées à l'espionnage, voire toutes. Une analyse juridique détaillée des activités américaines d'espionnage confirmera cette proposition et révélera que le comportement des États-Unis, si démontré, constitua en effet une violation du droit international public dans chaque cas. Puisque les États-Unis ne sont pas en mesure de s'appuyer sur une justification légale pour leurs actions, l'Allemagne pourrait conséquemment adopter des contremesures, considérant ses droits en la matière.

Desde 2014, los EE.UU. se encuentran acusados de estar comprometidos en el espionaje contra Alemania, un compañero de la OTAN y supuestamente aliado cercano. Muchas, aunque en ningún caso todas estas alegaciones se hicieron conocidas debido a las revelaciones de Snowden. En Alemania, esto ha conducido a un contragolpe público y ha hecho que muchos critiquen la reacción débil del gobierno alemán. Contra este telón, este artículo considera si la conducta presunta estadounidense aún pudo haber ido más allá del abuso de la confianza de Alemania, en realidad violando el derecho público internacional. Después del resumen

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\* Patrick C. R. Terry is a professor of law at the University of Public Administration in Kehl, Germany. He holds a PhD in public international law, a Master of Laws degree in international law and international relations (both from the University of Kent, United Kingdom) and two German law degrees (University of Tübingen and Ministry of Justice Stuttgart).

<sup>1</sup> Title of an espionage novel. John Le Carré, *Absolute Friends* (London: Hodder & Stoughton, 2003).

de las acusaciones principales, el estado del debate sobre la legalidad de espionaje en derecho internacional será analizado. Esto permitirá llegar a la conclusión que no hay hasta ahora ninguna respuesta convincente a la pregunta de si el espionaje viola el derecho público internacional o no. Esto es debido a las definiciones imprecisas, contradictorias y que se cambian del término "el espionaje", pero también, que es más importante al hecho que no hay ninguna necesidad del derecho internacional para tratar "con el espionaje". Más bien el derecho consuetudinario internacional ya proporciona la dirección clara en cuanto a la legalidad o ilegal de muchas, si no todas, actividades comúnmente asociadas con el espionaje. Un análisis detallado legal de las presuntas actividades de espionaje de EE.UU confirmará esta proposición y revelará que la conducta estadounidense, de ser probada, realmente de verdad violó el derecho público internacional en cada caso. EE.UU es incapaz de confiar en cualquier justificación legal para sus acciones, Alemania por consiguiente estaría bien dentro de sus derechos de adoptar contramedidas.

“In God we trust. All others we monitor.”<sup>2</sup>

The numerous recent allegations against the United States of America (USA), based mainly, though not entirely, on the Snowden revelations and involving various forms of spying against Germany, have led to widespread distrust of its supposedly close ally, the USA, among the German public. Many would argue that the German government’s reaction has fallen far short of what the public had a right to expect. Besides abusing Germany’s trust, the USA is also accused of having acted illegally.

Against this backdrop, the article examines whether the USA’s conduct, if proven, actually violated public international law. This will necessitate a short summary of the main allegations levelled against the USA as far as Germany is concerned. These can be divided into three categories:

a) the bribing of individual spies working for German government departments in order to obtain confidential information;

b) the use of the United States (US) Embassy and other buildings located in Germany in order to monitor government communications and the manipulation of telecommunication installations within Germany, as well as the installation of spyware on computers in Germany; and

c) the monitoring of German government and commercial communications from within the USA.

In order to assess the legality of such actions it is necessary, first of all, to present and evaluate the main arguments regarding the international legality of peacetime espionage. I will conclude that, due mainly to the imprecise, contradictory and changing definitions of espionage, no fully convincing argument as to the legality of espionage has so far been put forward. I will consequently suggest that the current state of the debate only obscures the actual necessity to examine the legality of each individual action undertaken by a State engaged in espionage separately. By doing so in the case of US spying against Germany, the article will demonstrate that public international law does in fact allow a legal assessment of most, if not all, espionage activities. This approach will finally allow the conclusion that none of the alleged American activities can be reconciled with international law and that therefore the German government would be justified in adopting countermeasures.

It should be noted that the article will not examine whether there is sufficient evidence to support the allegations made against the USA. Also, as the topic of the article concerns the legality of recent US spying in Germany, it follows that only peacetime espionage activities will be discussed. Furthermore, the question of whether the alleged US spying possibly violated international human rights law will not be discussed.

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<sup>2</sup> Anonymous quote, attributed variously to the NSA, US Naval Intelligence or other US intelligence services.

At the outset, prior to analysing the legal situation in detail, it is necessary to explain the nature of the alleged US espionage activities directed against Germany in more detail. Based on the Snowden revelations, the USA has been accused of conducting massive espionage operations aimed at penetrating the German government and German business. However, there have also been further claims of US spying in Germany, unrelated to Snowden. The accusations range from bribing German government officials in order to obtain secret information to monitoring German government communications both from within Germany and remotely from the USA.

## I. Active spies in Germany

Unrelated to the Snowden revelations, two possible cases of active US spies operating in Germany have become known to the public: the Central Intelligence Agency (CIA) is alleged to have paid a German employee of the German Foreign Intelligence Service (BND) €90 000 for passing on secret documents since at least 2008. Among the more than two hundred documents apparently passed on to the USA, were secret lists containing the real names and aliases of more than three thousand five hundred BND employees and a secret strategy paper detailing the BND's counter-espionage tactics.<sup>3</sup>

The employee was arrested in 2014 and indicted by the Attorney-General, not only for espionage, but also for the much more serious crime of treason.<sup>4</sup> He subsequently confessed and was sentenced to eight years in prison.<sup>5</sup> There were also reports that an employee at the Ministry of Defence had been spying for the USA.<sup>6</sup> However, it seems that the evidence produced so far has not been sufficient to indict

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<sup>3</sup> Brisante Infos, "Medienberichte über einen US-Spion beim BND" *TAZ* (2 September 2014), online: <http://www.taz.de/!5034160/>; "Spionage-Affäre: BND-Maulwurf soll Namensliste von 3500 Agenten gestohlen haben" *Spiegel Online* (14 January 2015), online: <http://www.spiegel.de/politik/deutschland/bnd-spionage-ffaere-doppelspion-stahl-liste-mit-agentennamen-a-1012849.html>.

<sup>4</sup> Fidelius Schmid, "Agententätigkeit für USA: BND-Spion wegen Landesverrats angeklagt" *Spiegel Online* (20 August 2015), online: <http://www.spiegel.de/politik/deutschland/bnd-spion-markus-r-wegen-landesverrats-angeklagt-a-1049010.html>.

<sup>5</sup> "Landesverrat: Ex-BND-Mitarbeiter legt Geständnis ab" *Zeit Online* (16 November 2015), online: <http://www.zeit.de/politik/2015-11/bnd-mitarbeiter-cia-spion-landesverrat-prozess>; Philip Oltermann, "No one trusted me with anything, says German triple agent" *The Guardian* (17 March 2016), online: <http://www.theguardian.com/world/2016/mar/17/german-triple-agent-markus-reichel-started-spying-because-he-felt-under-appreciated>.

<sup>6</sup> "Verteidigungsministerium: Bundesanwaltschaft ermittelt gegen möglichen US-Spion" *Spiegel Online* (9 July 2014), online: <http://www.spiegel.de/politik/deutschland/spionage-generalbundesanwalt-bestaetigt-neuen-fall-eines-us-spions-a-980089.html>; Hans Leyendecker & Georg Mascolo, "Ermittlungen gegen US-Spion im Verteidigungsministerium" *Süddeutsche Zeitung* (9 July 2014), online: <http://www.sueddeutsche.de/politik/ausweitung-der-geheimdienststaffaere-ermittlungen-gegen-us-spion-im-verteidigungsministerium-1.2038151>.

him.<sup>7</sup> Mainly because of the seriousness of these accusations, the German government reacted by expelling the CIA representative at the US Embassy in Berlin.<sup>8</sup>

## II. Monitoring of government communications from within Germany

It is also alleged that the National Security Agency (NSA) is monitoring German government and business communications from within the US Embassy in Berlin and the Consulate General in Frankfurt, the former's location being very close to the heart of government. It is claimed that the NSA has installed high-performance antennae on the roof of the embassy building, which enable it to spy on the German government.<sup>9</sup> It has even been suggested that this is how the USA was able to monitor German Chancellor Merkel's mobile phone.<sup>10</sup>

It is also claimed that the NSA, by deceiving the BND, misused the communications intercept station in Bad Aibling in order to spy on German allies, such as France,<sup>11</sup> and on German companies.<sup>12</sup> However, it has remained unclear to

<sup>7</sup> Jörg Diehl, Matthias Gebauer & Fidelius Schmid, "Verteidigungsministerium: Verfahren gegen mutmaßlichen US-Spion soll eingestellt werden" *Spiegel Online* (7 September 2014), online: Spiegel.de <<http://www.spiegel.de/politik/deutschland/us-spion-im-verteidigungsministerium-verfahren-vor-einstellung-a-990276.html>>.

<sup>8</sup> "Bundesregierung weist obersten US-Geheimdienstler aus" *Zeit Online* (10 July 2014), online: Zeit.de <<http://www.zeit.de/politik/ausland/2014-07/bundesregierung-geheimdienstler-ausweisung>>; Matthias Gebauer, "Spionage-Affäre: Berliner CIA-Chef soll noch diese Woche ausreisen" *Spiegel Online* (15 July 2014), online: Spiegel.de <<http://www.spiegel.de/politik/deutschland/spionage-afaere-berliner-cia-chef-soll-noch-diese-woche-ausreisen-a-981193.html>>.

<sup>9</sup> "Die Spionage-Botschaft" *Frankfurter Allgemeine* (26 October 2013), online: Faz.net <<http://www.faz.net/aktuell/politik/ausland/ausspach-afaere-die-spionage-botschaft-12635377.html>>; Konrad Lischka & Matthias Kremp, "NSA-Spähaffäre: So funktionieren die Abhöranlagen in US-Botschaften" *Spiegel Online* (28 October 2013), online: Spiegel.de <<http://www.spiegel.de/netzwelt/netzpolitik/nsa-spahskandal-so-funktionieren-die-abhoeranlagen-in-us-botschaften-a-930392.html>>.

<sup>10</sup> "Das Dachgeschoss gehört den Spionen" *Frankfurter Allgemeine* (27 October 2013), online: Faz.net <<http://www.faz.net/aktuell/politik/inland/amerikanische-botschaft-in-berlin-das-dachgeschoss-gehört-den-spionen-12635981.html>>.

<sup>11</sup> Andreas Geldner, "Spannungen zwischen Deutschland und den USA. Wer definiert was Spionage ist?" *Stuttgarter Zeitung* (7 June 2015), online: Stuttgarter-Zeitung.de <<http://www.stuttgarter-zeitung.de/inhalt.spannungen-zwischen-deutschland-und-den-usa-der-definiert-was-spionage-ist.17c94987-7ced-4877-9fcd-7c6db5822f60.html>>; "Bericht: NSA nutzte BND-Kooperation [sic] für Spionage gegen Europa" *Baden Online* (23 April 2015), online: Bo.de <<http://www.bo.de/nachrichten/nachrichten/bericht-nsa-nutzte-bnd-koperation-fuer-spionage-gegen-europa>>.

<sup>12</sup> The German Special Investigator, appointed by the German government in order to investigate the cooperation between the BND and the NSA, has come to the conclusion that the NSA repeatedly violated the Memorandum of Agreement between the two states which ruled out any spying activity directed against German or allied European targets. See "NSA: Sonderermittler beschuldigt die USA" *Zeit Online* (30 October 2015), online: Zeit.de <<http://www.zeit.de/politik/ausland/2015-10/nsa-bnd-selektoren-bericht-sonderermittler-graulich>>; Axel Kannenberg, "BND-Skandal: NSA wollte angeblich auch Siemens ausspionieren" *Heise online* (10 May 2015), online: Heise.de <<http://www.heise.de/newsticker/meldung/BND-Skandal-NSA-wollte-angeblich-auch-Siemens-ausspionieren-2639900.html>>.

what extent the BND may have cooperated with the NSA in this respect.<sup>13</sup> There has also been speculation that the USA is misusing military bases to spy on German politicians.<sup>14</sup> Furthermore, the USA has been accused of being responsible for the installation of spy ware (“Regin”) on a computer used by an assistant working in the German Chancellor’s Office.<sup>15</sup> In the latter case, the Attorney-General has recently initiated preliminary proceedings.

### III. Monitoring of German government communications from outside of Germany (cyber espionage)

Mainly based on the Snowden revelations, there have been allegations that the NSA, often in cooperation with the British security services, has been monitoring a wide range of German government communications, from outside of Germany, mainly from the USA.<sup>16</sup>

This seems to have been made possible by programmes such as PRISM, which enable the NSA to monitor internet communications worldwide, not necessarily involving any actions abroad.<sup>17</sup> Such conduct is generally referred to as cyber espionage.<sup>18</sup> As a result, the NSA has, for example, allegedly been able to gather five hundred million metadata, originating in Germany, within a four-week-period.<sup>19</sup> Furthermore, the NSA has apparently been monitoring telephone conversations of leading German politicians for many years.<sup>20</sup> Among other things,

<sup>13</sup> “NSA benutzte BND vor allem für politische Spionage” *Zeit Online* (29 April 2015), online: Zeit.de <<http://www.zeit.de/digital/datenschutz/2015-04/bundesnachrichtendienst-spionage-nsa-bundesregierung>>; “BND schränkt Spionage für NSA ein, keine Daten aus Internetüberwachung” *N-TV* (7 May 2015), online: N-TV <<http://www.n-tv.de/politik/Keine-Daten-aus-Internetueberwachung-article15054626.html>>.

<sup>14</sup> Theresa Breuer & Annett Meiritz, “Neues NSA-Abhörzentrum: US-Geheimdienst will künftig auch aus Wiesbaden spähren” *Spiegel Online* (18 July 2013), online: Spiegel.de <<http://www.spiegel.de/politik/deutschland/nsa-nutzt-neues-abhoerzentrum-in-wiesbaden-a-911811.html>>; Jutta Rippegather, “NSA US-Militärstützpunkt, Spione in der Landeshauptstadt” *Frankfurter Rundschau* (18 July 2013), online: Fr-online.de <<http://www.fr-online.de/rhein-main/nsa-us-militaerstuetzpunkt-spione-in-der-landeshauptstadt,1472796,23756242.html>>.

<sup>15</sup> “NSA schnüffelte Merkel-Mitarbeiterin aus” *Mitteldeutscher Rundfunk* (24 October 2015), online: Mitteldeutscher Rundfunk <<http://www.mdr.de/nachrichten/ermittlungen-nsa-ffaere100.html>>.

<sup>16</sup> “GCHQ, NSA targeted charities, Germans, Israeli PM and EU chief” *The Guardian* (20 December 2013), online: Theguardian.com <<http://www.theguardian.com/uk-news/2013/dec/20/gchq-targeted-aid-agencies-german-government-eu-commissioner>>.

<sup>17</sup> Patrick Beuth & Kai Biermann, “Das Spionage-System Prism und seine Brüder” *Zeit Online* (13 June 2013), online: Zeit.de <<http://www.zeit.de/digital/datenschutz/2013-06/nsa-prism-faq>>.

<sup>18</sup> See the various national and international definitions of the term “cyber espionage” provided by the NATO Cooperative Cyber Defence Centre of Excellence, *Cyber Definitions*, online: North Atlantic Treaty Organization <<https://ccdcoe.org/cyber-definitions.html>>; Ella Shoshan, *Applicability of International Law on Cyber Espionage Intrusions* (Thesis, Faculty of Law, Stockholm University, 2014) at 14-15, online: DiVA <<http://www.diva-portal.org/smash/get/diva2:799485/FULLTEXT01>> [Shoshan].

<sup>19</sup> Marcel Rosenbach & Holger Stark, *Der NSA Komplex: Edward Snowden und der Weg in die totale Überwachung* (München: Deutsche Verlags-Anstalt, 2015) at 233-37 [Rosenbach & Stark].

<sup>20</sup> “Regierung bestellt US-Botschafter ein” *Zeit Online* (2 July 2015), online: Zeit.de <<http://www.zeit.de/politik/deutschland/2015-07/nsa-merkel-spionage-wikileaks>>.

Wikileaks published minutes of a conversation between German Chancellor Merkel and an assistant, which the NSA had recorded.<sup>21</sup> The German government reacted to this revelation by summoning the US ambassador.<sup>22</sup> Very recently, it has also been claimed that the NSA has been able to monitor confidential communications originating from within the BND.<sup>23</sup>

## A. Peacetime espionage in Public International Law

Having outlined the allegations levelled at the USA as far as espionage in Germany is concerned, it is now necessary to turn to the question of whether these activities would, if proven, amount to a violation of public international law.

Any such analysis necessitates, first of all, a summary of the current views as to the legality or illegality of espionage in international law. The International Court of Justice (ICJ), when confronted with the issue, was able to avoid giving an opinion.<sup>24</sup> As will subsequently be demonstrated, most academics, scholars, and courts, when discussing the topic, usually examine the international legality of espionage as such. After defining the meaning of the term “espionage” as used in the context of this article, the main arguments put forward will be presented. It will, however, be argued that this approach, for various reasons, is misguided and that the decisive discussion that needs to be had is whether the individual actions undertaken by foreign States in order to obtain information or influence events are compatible with international law.

### 1. PEACETIME ESPIONAGE’S LEGALITY IN INTERNATIONAL LAW – THE STATE OF THE DEBATE

It should first be pointed out that peacetime espionage as understood in this article is limited to the gathering by or on behalf of a State of information, which is not publicly available and that another State wants to keep secret.<sup>25</sup>

<sup>21</sup> “NSA-Abhörprotokolle von Angela Merkel” *Süddeutsche Zeitung* (2 July 2015), online: SZ.de <<http://www.sueddeutsche.de/politik/spionage-nsa-abhoerprotokoll-von-angela-merkel-1.2547431>>.

<sup>22</sup> *Ibid.*

<sup>23</sup> “Snowden-Dokumente: NSA fing offenbar BND-Kommunikation ab” *Spiegel Online* (25 September 2015), online: Spiegel.de <<http://www.spiegel.de/netzwelt/netzpolitik/fairview-nsa-hat-sensible-informationen-des-bnd-abgefangen-a-1054727.html>>.

<sup>24</sup> *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, [1980] ICJ Rep 3 at 80-86 [*US Diplomatic and Consular Staff in Tehran*]. The ICJ discussed Iran’s claims of American espionage conducted from within the US Embassy as a possible justification for the subsequent hostage taking. Not surprisingly, the ICJ rejected this line of argument by, firstly, pointing out that Iran had not substantiated its claims, and, secondly, that even if proven, these allegations would not serve as a justification for Iran’s conduct (also because diplomatic law provided a self-contained regime to deal with “such abuses of the diplomatic function”).

<sup>25</sup> Stefan Talmon, “Sachverständigen Gutachten gemäß Beweisbeschluss SV-4 des 1. Untersuchungsausschusses des Deutschen Bundestages der 18. Wahlperiode (3 June 2014), Universität Bonn, online: Bundestag.de at 16 <<https://www.bundestag.de/>>



As far as the legality of such conduct is concerned there are three broad strands of argument.<sup>26</sup> Some argue that espionage is legal under public international law. They base this argument mainly on the *Lotus* principle, developed by the Permanent Court of International Justice (PCIJ), which stated that a State's conduct is permitted as long as it is not expressly forbidden under an established rule of international law.<sup>27</sup> Since no treaties outlawing espionage have been concluded and no rule in customary international law has developed which prohibits espionage, the PCIJ's jurisprudence must lead to the conclusion that espionage is legal.<sup>28</sup> This is apparently confirmed by state practice, as virtually all States conduct espionage against other States.<sup>29</sup> In fact, some go even further, and claim that state practice had led to the creation of a rule in customary international law, which in fact explicitly permits espionage.<sup>30</sup> Proponents of espionage's legality have also argued that

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blob/282872/2b7b605da4c13cc2bc512c9c899953c1/mat\_a\_sv-4-2\_talmon-pdf-data.pdf> [Talmon, *Sachverständigengutachten*]; Raphael Bitton, "The Legitimacy of Spying Among Nations" (2014) 29:5 Am U Int'l L Rev 1009 at 1011 [Bitton].

<sup>26</sup> Christoph D Baker, "Tolerance of International Espionage: A Functional Approach" (2003) 19:5 Am U Int'l L Rev 1091 at 1093-97 [Baker]; Simon Chesterman, "The Spy who came in from the Cold War: Intelligence and International Law" (2006) 27 Mich J Int'l L 1071 at 1074-75 [Chesterman]; Craig Forcece, "Spies Without Borders: International Law and Intelligence Collection" (2011) 5 Journal of National Security Law & Policy 179 at 204 [Forcece, "Spies Without Borders"]; Afsheen John Radsan, "The Unresolved Equation of Espionage and International Law" (2007) 28:597 Mich J Int'l L 597 at 602 [Radsan].

<sup>27</sup> The PCIJ phrased the so-called *Lotus* principle as follows: "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. *Restrictions upon the independence of States cannot therefore be presumed.*" [Emphasis added.]. See *The Case of the SS "Lotus" (France v Turkey)* (1927), PCIJ (Ser A) No 10 at 18 [*The Case of the SS "Lotus"*].

<sup>28</sup> Julius Stone, "Legal Problems of Espionage in Conditions of Modern Conflict" in Roland J Stanger, ed, *Essays on Espionage and International Law* (Columbus: Ohio State University Press, 1962) 29 at 33-34 [Stone]; Talmon, *Sachverständigengutachten*, *supra* note 25 at 16-18; Stefan Talmon, "Das Abhören des Kanzlerhandys und das Völkerrecht" (2013) No 3 Bonn Research Papers on Public International Law 2 at 6 [Talmon, "Das Abhören"]; German Federal Court of Justice (Bundesgerichtshof or BGH; Criminal Law Division), BGHSt 37, 305 at para 11-12 (Juris Online; details see fn 45); Ernesto J Sanchez, "Intelligence Collection, Covert Operations, and International Law" (2014) Draft Article to be published in the AFIO Intelligence Journal at 1-9, online: Afio.com <[http://www.afio.com/publications/SANCHEZ%20Enesto\\_Intelligence%20and%20International%20Law%20DRAFT%202014Oct08.pdf](http://www.afio.com/publications/SANCHEZ%20Enesto_Intelligence%20and%20International%20Law%20DRAFT%202014Oct08.pdf)> [Sanchez]. He offers another approach by mainly arguing that international law was so vague it was not possible for opponents of espionage to convincingly argue that spying was unlawful.

<sup>29</sup> Stone, *supra* note 28 at 33-35; Gary Brown & Keira Poellet, "The Customary International Law of Cyberspace" (Fall 2012) Strategic Studies Quarterly 126 at 133-34 [Brown & Poellet]; Roger D Scott, "Territorially Intrusive Intelligence Collection and International Law" (1999) 46 The Airforce Law Review 217 at 217-26 [Scott]; Jorge H Romero, "Cyberespionage 2010: Is the Current Status of Espionage under International Law Applicable in Cyberspace?" (Paper delivered at the *International Law at the Turn of the Century Seminar*, Georgetown University Law Center, April 2001) at 4-5, 16 [Romero]; Glenn Sulmasy & John Yoo, "Counterintuitive: Intelligence Operations and International Law" (2006-2007) 28 Mich J Int'l L 625 at 628-629 [Sulmasy & Yoo]; Jeffrey H Smith, "A Matter of Integrity" (2007) 49 Law Quadrangle Notes 3 at 15 [Smith].

<sup>30</sup> Smith, *supra* note 29 at 15; Romero, *supra* note 29 at 19, 44; Scott, *supra* note 29 at 226. Scott is more careful in his assessment. While repeatedly stressing that states' practice indicated that "international

espionage is and should be legal, as it apparently reinforces international stability: because spying enables States to gain information on another State's activities in time, they can react proactively to any developing crisis, thereby often making the use of force obsolete.<sup>31</sup> Others therefore go on to claim that espionage must be seen as a facet of self-defence.<sup>32</sup> Interestingly, however, some (mainly US) advocates of the legality of espionage are now calling for new rules as far as cyber espionage is concerned,<sup>33</sup> a problem that the USA obviously feels more vulnerable to in comparison to traditional espionage.<sup>34</sup> Certainly in respect of economic cyber espionage, the USA, whilst being accused of such conduct itself,<sup>35</sup> has been forthright in condemning such activities on the part of other States.<sup>36</sup>

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law tolerates the collection of intelligence in the territory of other nations", he does conclude that international law is "ambiguous" as far as espionage is concerned.

- <sup>31</sup> Stone, *supra* note 28 at 40-43; Christina Parajon Skinner, "An International Law Response to Economic Cyber Espionage" (2014) 46:4 ConnL R 1165 at 1183 [Skinner]; Baker, *supra* note 26 at 1095-96; Bitton, *supra* note 25 at 1009-70; Chesterman, *supra* note 26 at 1076, 1090-98, 1126, 1129; Romero, *supra* note 29 at 8-10; Sulmasy & Yoo, *supra* note 29 at 625-28, 633-36; Ian H Mack, *Towards Intelligent Self-Defence: Bringing Peacetime Espionage in From the Cold and Under the Rubric of the Right of Self-Defence* (Honours Thesis, Sydney Law School, 2013) at 4, 21-22, online: Sydney eScholarship Repository, <<http://ses.library.usyd.edu.au/bitstream/2123/11510/1/HONOURS%20FINAL%20PDF.pdf>> [Mack]. Although Mack generally seems to view espionage as illegal under international law, he argues that public international law should develop in such a way so as to permit espionage.
- <sup>32</sup> Sanchez, *supra* note 28 at 2; Baker, *supra* note 26 at 1091-92, 1096-97 (although he supports the view that espionage is neither "endorsed" nor "prohibited" by international law); Mack, *supra* note 31 at 34-42; Romero, *supra* note 29 at 16; Sulmasy & Yoo, *supra* note 29 at 636-37.
- <sup>33</sup> Skinner, *supra* note 31 at 1183-97. While not looking at the legal issues raised by "traditional espionage" and claiming that espionage was beneficial, she goes on to argue that economic cyber espionage should be treated differently by adopting broad interpretations of concepts such as sovereignty and intervention. Brown & Poellet, *supra* note 29 at 126-45. They argue that treaties on cyber activities should be negotiated. John F Murphy, "Cyber War and International Law: Does the International Legal Process Constitute a Threat to US Vital Interests?" (2013) 89 International Law Studies 309 [Murphy]. For another view, see Romero, *supra* note 29 at 38-43.
- <sup>34</sup> David E Sanger, "Cyberthreats Posed by China and Iran Confounds White House" *The New York Times* (15 September 2015), online: NYTimes.com <[http://www.nytimes.com/2015/09/16/world/asia/cyberthreat-posed-by-china-and-iran-confounds-white-house.html?\\_r=0](http://www.nytimes.com/2015/09/16/world/asia/cyberthreat-posed-by-china-and-iran-confounds-white-house.html?_r=0)> [David Sanger, "Cyberthreats"]; Murphy, *supra* note 33. Indicative of the US approach in this area are the comments by Waxman. Matthew C Waxman, "Cyber-Attacks and the Use of Force: Back to the Future of Article 2 (4)" (2011) 36:2 Yale Int'l L 421 at 435: "Experts inside and outside the government widely agree that the United States is especially strong relative to other states with respect to its ability to penetrate and collect information from others' systems. [...] U.S. planners may be reluctant to draw boundaries too tight, lest those boundaries impede their own ability to infiltrate and extract information from others' systems".
- <sup>35</sup> Klaus Remme, "Kein Partner der USA, sondern Konkurrent" *Deutschlandradio Kultur* (2 July 2015), online: Deutschlandradio Kultur <[http://www.deutschlandradiokultur.de/nsa-spionage-kein-partner-der-usa-sondern-konkurrent.996.de.html?dram:article\\_id=324367](http://www.deutschlandradiokultur.de/nsa-spionage-kein-partner-der-usa-sondern-konkurrent.996.de.html?dram:article_id=324367)> [Remme].
- <sup>36</sup> Office of Public Affairs, *US Charges Five Chinese Military Hackers for Cyber Espionage Against US Corporations and a Labor Organization for Commercial Advantage* (19 May 2014), online: The United States Department of Justice <<http://www.justice.gov/opa/pr/us-charges-five-chinese-military-hackers-cyber-espionage-against-us-corporations-and-labor>>; Siobhan Gorman, "China Singled out for Cyberspying" *The Wall Street Journal* (4 November 2011), online: WSJ.com <<http://www.wsj.com/articles/SB10001424052970203716204577015540198801540>>.

Others argue that espionage is generally to be viewed as illegal.<sup>37</sup> Spying, they claim, is basically always an illegal interference or intervention in another State's internal affairs.<sup>38</sup> Furthermore, espionage is claimed to regularly amount to a violation of another State's sovereignty: by spying, a State extends its governmental functions and activities without respecting the victim State's jurisdiction, thereby violating that State's exclusive right of enforcement within its territory.<sup>39</sup> These arguments have more recently been supported by some, mainly South American, statesmen and -women, following the Snowden revelations of massive US spying on their continent.<sup>40</sup> Furthermore, the facts that virtually all domestic criminal law codes expressly forbid espionage<sup>41</sup> and even diplomats, often privileged, are not permitted to engage in espionage in the host State further reinforces the argument that such conduct is illegal.<sup>42</sup>

Finally, a third strand of argument claims that espionage is neither legal nor illegal in public international law.<sup>43</sup> Just as those who claim espionage is legal, proponents of this contention point out that there is neither a treaty nor a rule of

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<sup>37</sup> Richard A Falk, "Space Espionage and World Order: A Consideration of the Samos-Midas-Program" in Roland J Stanger, ed. *Essays on Espionage and International Law* (Columbus: Ohio State University Press, 1962) 45 at 57 [Falk]; Douwe Korff, "Expert opinion prepared for the Committee of Inquiry of the Bundestag into the "SEYES" global surveillance systems revealed by Edward Snowden" *Deutscher Bundestag* (4 June 2014) at 6, online: Bundestag.de <[http://www.bundestag.de/blob/282874/8f5bae2c8f01cdabd37c746f98509253/mat\\_a\\_sv-4-3\\_korff-pdf-data.pdf](http://www.bundestag.de/blob/282874/8f5bae2c8f01cdabd37c746f98509253/mat_a_sv-4-3_korff-pdf-data.pdf)> [Korff] (however, limited to spying activities that amount to criminal offences according to the laws of the "target state"); Mack, *supra* note 31 at 15; Manuel R Garcia-Mora, "Treason, Sedition and Espionage as Political Offenses under the Law of Extradition" (1964-1965) 26 U Pitt L Rev 65 at 79-80; Ingrid Delupis, "Foreign Warships and Immunity for Espionage" (1984) 78:1 AJIL 53 at 67-68 (however, limited to "the presence of agents sent clandestinely by a foreign power into the territory of another state").

<sup>38</sup> Quincy Wright, "Espionage and the Doctrine of Non-Intervention in Internal Affairs" in Roland J Stanger, ed. *Essays on Espionage and International Law* (Columbus: Ohio State University Press, 1962) 3 at 5, 12-13 [Quincy Wright]; Mack, *supra* note 31 at 15-16.

<sup>39</sup> Quincy Wright, *supra* note 38, at 12-13; Mack, *supra* note 31 at 16.

<sup>40</sup> Julian Borger, "Brazilian president: US surveillance a 'breach of international law'" *The Guardian* (24 September 2013), online: Theguardian.com <<http://www.theguardian.com/world/2013/sep/24/brazil-president-un-speech-nsa-surveillance>> [Borger]; Carla Stea, "Latin America Condemns US Espionage at United Nations Security Council" *Center for Research on Globalization* (17 August 2013), online: Global Research <<http://www.globalresearch.ca/latin-america-condemns-us-espionage-at-united-nations-security-council/5346120>> [Stea]; David Fickling, "Mossad spies' jailed over New Zealand passport fraud" *The Guardian* (16 July 2004), online: Theguardian.com <<http://www.theguardian.com/world/2004/jul/16/israel>> [Fickling].

<sup>41</sup> Falk, *supra* note 37 at 57.

<sup>42</sup> Quincy Wright, *supra* note 38 at 13.

<sup>43</sup> Helmut P Aust, "Stellungnahme zur Sachverständigenanhörung am 5 Juni 2014" *Humboldt-Universität Zu Berlin* (28 May 2014) at 14-15, online: Bundestag.de <[https://www.bundestag.de/blob/282870/fc52462f2ffd254849bce19d25f72fa2/mat\\_a\\_sv-4-1\\_aust-pdf-data.pdf](https://www.bundestag.de/blob/282870/fc52462f2ffd254849bce19d25f72fa2/mat_a_sv-4-1_aust-pdf-data.pdf)> [Aust]; Christoph Gusy, "Spionage im Völkerrecht" (1984) No 5 NZWehrR 187 at 190-91, 194 [Gusy]; Baker, *supra* note 26 at 1092; Jessica A Feil, "Cyberwar and Unmanned Aerial Vehicles: Using New Technologies, from Espionage to Action" (2012) 45:1 Case W Res J Int'l L 513 at 524-25 [Feil]; Forcese, "Spies Without Borders", *supra* note 26 at 204-05 ("position [...] closest to the truth"); probably Scott, *supra* note 29 at 217-26; Radsan, *supra* note 26 at 596; possibly Torsten Stein & Thilo Maruhn, "Völkerrechtliche Aspekte von Informationsoperationen" (2000) 60 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 1 at 32-33 [Stein & Maruhn]. They repeatedly refer to espionage as being "not prohibited" in public international law.

customary international law that expressly prohibits espionage, making it impossible to argue that spying was illegal.<sup>44</sup> Furthermore, based on the clean-hands-principle, States, usually themselves engaged in spying could not convincingly claim that another State's comparable activity was illegal. On the other hand, it is acknowledged that every State is entitled to prosecute spies, making it difficult to argue that such conduct was expressly legal under public international law as that would seem contradictory.<sup>45</sup>

## 2. ASSESSMENT OF THE MAIN ARGUMENTS

None of these arguments is wholly convincing. It is argued here that this is mainly due to the ambiguous and unclear definition of espionage, the nature of which has changed in the course of time, making a blanket judgement as to the legality or illegality of espionage in public international law virtually impossible.

The proposition that espionage is legal under public international law is the least convincing. There is no known treaty in force that expressly permits espionage. As for customary international law, the ICJ has explained that a valid new rule of customary international law comes about when there is sufficient state practice and that state practice is supported by *opinio juris*, in other words, States have justified their actions by referring to international law.<sup>46</sup> In the case of espionage, the *opinio juris* requirement is completely lacking.<sup>47</sup> Not once has a State, accused of espionage,

<sup>44</sup> Aust, *supra* note 43 at 14-15; Baker, *supra* note 26 at 1094; Radsan, *supra* note 26 at 597.

<sup>45</sup> That was the view taken by the *German Constitutional Court* (Bundesverfassungsgericht or BVerfG) when deciding whether East German spies engaged in espionage could be prosecuted for treason/espionage following unification. The Court declared that the special status of espionage in public international law was based on the fact that, on the one hand, public international law did "not prohibit" such activity, while it, on the other hand, allowed states to prosecute a spy even if he/she had only been active abroad. The Court went on to describe espionage as "legally ambivalent". See BVerfGE 92, 277, at para 190-91 (*Juris Online*). The *German Federal Court of Justice* (Criminal Law Division), however, seems to take a slightly different approach. After explaining that espionage was neither permitted nor outlawed or limited in any way by treaty or customary international law, it concludes that espionage was therefore "permitted" (quotation marks in the original German text) in public international law; BGHSt 37, 305, at para 11-12 (*Juris Online*). For similar arguments see Kirsten Schmalenbach, *Casebook Internationales Recht*, 2<sup>nd</sup> ed (Wien: Facultas Verlags-und Buchhandels AG, 2014) at 25-26 [Schmalenbach]; Aust, *supra* note 43 at 14-15; Feil, *supra* note 43 at 524-25; Scott, *supra* note 29 at 217-26; Gusy, *supra* note 43 at 190-91. He points out that the fact public international law does not regulate espionage also means that a State cannot justify its spying based on public international law.

<sup>46</sup> *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, [1969] ICJ Rep 3 at para 73-74 [*North Sea Continental Shelf Cases*].

<sup>47</sup> *Canadian Security Intelligence Service Act (Re)*, 2008 FC 301 at para 53 [*Re Canadian Security Intelligence Service Act*]. In refusing the Canadian Security Service's application for a warrant to undertake investigative actions in other states, the Federal Court explicitly rejected the CSIS's argument that "the practice of 'intelligence-gathering operations' in foreign states is recognized as a 'customary practice' in international law." Quincy Wright, *supra* note 38 at 17. Wright goes further and argues that "the practice is accompanied not by a sense of right but by a sense of wrong." Forcese, "Spies Without Borders", *supra* note 26 at 203; Chesterman, *supra* note 26 at 1072; Shoshan, *supra* note 18 at 27-28; Pal Wrangle, *Intervention in national and private cyber space and international law* (Paper delivered at the The Fourth Biennial Conference of the Asian Society of International Law,

claimed that its conduct was legal. Rather, States have remained silent in the face of such accusations or have flatly denied the charge.<sup>48</sup>

Furthermore, States have regularly expressed their disapproval of such conduct on the part of other States, even if they have not couched this in legal terms,<sup>49</sup> and have reacted by expelling diplomats of the State accused, even if these diplomats had nothing to do with the original allegations.<sup>50</sup> More recently, some politicians have in fact expressly claimed that espionage violates international law.<sup>51</sup>

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Delhi, 14-16 November 2013) at 13, online: DiVA <<http://www.diva-portal.org/smash/get/diva2:682092/FULLTEXT02>> [Wrangle]; Aaron Shull, "Cyberespionage and International Law" (Paper delivered at the GigaNet 8th Annual Symposium, Bali, 12 October 2013) at 7-8, online: Api.ning.com <[api.ning.com/files/Ug.../giganet2013\\_Shull.pdf](http://api.ning.com/files/Ug.../giganet2013_Shull.pdf)> [Shull].

<sup>48</sup> Quincy Wright, *supra* note 38 at 17; Anne Peters, "Surveillance Without Borders? The Unlawfulness of the NSA-Panopticon, Part I" *Blog of the European Journal of International Law* (1 November 2013), online: EJIL, Talk! <<http://www.ejiltalk.org/surveillance-without-borders-the-unlawfulness-of-the-nsa-panopticon-part-i/>> [Peters]; Shoshan, *supra* note 18 at 28.

<sup>49</sup> Chesterman, *supra* note 26 at 1072. He claims "state practice and *opinio juris* appear to run in opposite directions". "Hollande: alleged US spying 'unacceptable'" *Deutsche Welle* (24 June 2015), online: DW.com <<http://www.dw.com/en/hollande-alleged-us-espionage-unacceptable/a-18538105>>; Andrea Thomas, "US Spying on Germany unacceptable, says Merkel" *The Wall Street Journal* (12 July 2014), online: WSJ.com <<http://www.wsj.com/articles/u-s-spying-on-germany-unacceptable-says-merkel-1405174452>>; "Christopher [the then US Foreign Secretary] calls Russian espionage 'unacceptable'" *Ludington Daily News* (23 February 1994), online: Google News <<https://news.google.com/newspapers?nid=110&dat=19940223&id=nTRQAAAIBAJ&sjid=yFUDA AAAIBAJ&pg=2916,4110458&hl=de>> ["Christopher calls Russian espionage 'unacceptable'"]; "Netanyahu says US spying on Israel 'unacceptable', calls for 'clarifications'" *The Jerusalem Post* (23 December 2013), online: Jpost.com <<http://www.jpost.com/Diplomacy-and-Politics/Netanyahu-says-US-spying-on-Israel-unacceptable-calls-for-clarifications-335901>>; Shoshan, *supra* note 18 at 28.

<sup>50</sup> Following the arrest of the alleged Russian spy, Federal Bureau Investigation agent Hanssen, in February 2001, the US expelled fifty Russian diplomats in March 2001 (See James Risen & Jane Perlez, "Russian diplomats ordered expelled in a countermove" *The New York Times* (22 March 2001), online: NYTimes.com <<http://www.nytimes.com/2001/03/22/world/russian-diplomats-ordered-expelled-in-a-countermove.html>>). In 2009, Romania expelled three Russian and two Ukrainian diplomats after news surfaced according to which a Romanian and a Bulgarian had sold confidential information to a Ukrainian official (See "Romania expelled three Russian diplomats after Ukraine espionage scandal" *Nine o'Clock* (17 May 2009), online: Nineoclock.ro <<http://www.nineoclock.ro/romania-expelled-three-russian-diplomats-after-ukraine-espionage-scandal/>>). In 2012, Canada expelled four Russian diplomats after it was claimed that a Canadian military officer had been spying for Russia (See Steven Chase, Oliver Moore & Tamara Baluja, "Ottawa expels Russian diplomats in wake of charges against Canadian" *The Globe and Mail*, (6 September 2012), online: Theglobeandmail.com <<http://www.theglobeandmail.com/news/politics/ottawa-expels-russian-diplomats-in-wake-of-charges-against-canadian/article1359125/>>). In November 2014, Poland expelled a number of Russian diplomats after it became known that a Polish lawyer and a Polish military officer had allegedly been spying for Russia (See "Poland expels Russian diplomats over spying, Russia returns the favour" *New York Daily News* (18 November 2014), online: Daily News <<http://www.nydailynews.com/news/world/oles-russians-expel-diplomats-spying-article-1.2014450>>); Chesterman, *supra* note 26 at 1072.

<sup>51</sup> Borger, *supra* note 40; Stea, *supra* note 40; Fickling, *supra* note 40.

Given the fact that espionage is often described as the “world’s second-oldest profession”<sup>52</sup> it also seems far-fetched to claim that spying is a means of increasing international stability and avoiding war, considering the vast number of wars the world has experienced.<sup>53</sup> Indeed, manipulated and incomplete intelligence has been used to justify highly contentious wars, such as the attack on Iraq in 2003.<sup>54</sup> To claim that espionage is justified as self-defence under Article 51 of the *Charter of United Nations (UN Charter)* is similarly unconvincing. Asserting that espionage is a means of self-defence renders the “armed attack” – requirement in Article 51 meaningless because peacetime spying is obviously conducted well in advance of any armed attack and certainly would therefore not meet any sensibly-defined imminence criterion.<sup>55</sup> Rather, this argument completely ignores the well-known fact that a large share of espionage is not about assessing other countries’ military capabilities or possible plans of attack, but rather concerned with gaining advantages in the economic sphere or attempts at blocking other countries’ peaceful foreign policy goals which contradict the spying States’ aims.<sup>56</sup> The whole area of economic espionage, something States, such as China and, more recently, the USA<sup>57</sup> have been accused of engaging in, can hardly be reconciled with self-defence arguments. Lastly, this chain of arguments fails to explain the contradiction between the purported explicit legality of espionage in international law and the undisputed right of every country to prosecute and imprison convicted spies: if espionage were a legal activity under international law, then surely it would follow that the target State should not be permitted to prosecute foreign spies, in particular citizens of the country engaged in espionage.

The proposition that espionage is neither legal nor illegal as far as international law is concerned is more convincing. The argument tries to bridge the gap between a lack of official statements condemning espionage as a violation of international law and the right of States to prosecute spies. However, the strongest argument in support of espionage’s legality is this view’s weakest link: it remains ambiguous how this approach can be reconciled with the aforementioned *Lotus*

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<sup>52</sup> Chesterman, *supra* note 26 at 1072. He refers to Sun Tzu’s *The Art of War* (“XIII: On the Use of Spies”, online: Web.mit.edu <<http://web.mit.edu/~dcltdw/AOW/13.html>>), generally assumed to have been written in the 6<sup>th</sup> century BC. Spying is also mentioned in the Old Testament, for example, in *Joshua* 2:2.

<sup>53</sup> Falk, *supra* note 37 at 57-68 (referring to a specific US satellite programme); Roland J Stanger, “Espionage and Arms Control” in Roland J Stanger, ed, *Essays on Espionage and International Law* (Columbus: Ohio State University Press, 1962) 83 at 89-90, 99. He points out how ineffective espionage has been in detecting weapons capabilities.

<sup>54</sup> “MI6 ran ‘dubious’ Iraq campaign” *BBC News* (21 November 2003), online: BBC <[http://news.bbc.co.uk/2/hi/uk\\_news/3227506.stm](http://news.bbc.co.uk/2/hi/uk_news/3227506.stm)>; Jeffrey Donovan, “U.S.: CIA takes blame for dubious intelligence on Iraq” *Radio Free Europe/Radio Liberty* (14 July 2003), online: Rferl.org <<http://www.rferl.org/content/article/1103790.html>>.

<sup>55</sup> Quincy Wright, *supra* note 38 at 19.

<sup>56</sup> Office of the National Counterintelligence Executive (USA), *Foreign Spies Stealing US Economic Secrets In Cyberspace, Report to Congress on Foreign Economic Collection and Industrial Espionage 2009-2011* (October 2011), online: National Counterintelligence and Security Center <[http://www.ncsc.gov/publications/reports/fecie\\_all/Foreign\\_Economic\\_Collection\\_2011.pdf](http://www.ncsc.gov/publications/reports/fecie_all/Foreign_Economic_Collection_2011.pdf)>; Wesley Bruer, “FBI sees Chinese involvement amid sharp rise in economic espionage” *CNN* (24 July 2015), online: CNN.com <<http://edition.cnn.com/2015/07/24/politics/fbi-economic-espionage/>>.

<sup>57</sup> Remme, *supra* note 35.

principle, which the ICJ, after all, even nowadays still seems to be relying on in its reasoning.<sup>58</sup>

The argument that espionage is illegal under international law seems the most convincing. After all, many activities associated with espionage can easily be classified as violations of another State's sovereignty. However, it cannot be overlooked that this view lacks clear support as far as States' statements on the topic are concerned despite them having many opportunities to express their disapproval in legal terms.<sup>59</sup> Only very recently have individual States started to openly and unequivocally condemn other States' espionage as a violation of international law.

### 3. ESPIONAGE – A LACUNA IN PUBLIC INTERNATIONAL LAW?

Why then has public international law not produced a compelling answer to the question of whether espionage is legal or illegal?<sup>60</sup> There are a number of reasons for this: firstly, there is no concise, universally agreed definition of “espionage”; secondly, the means of espionage are changing rapidly; and thirdly, as will be shown, there has been no need to develop a specific legal regime to deal with espionage, as most activities commonly associated with it are already prohibited under international law.

There is no general agreement as to the definition of peacetime espionage.<sup>61</sup> Some authors agree with the definition used here, namely that espionage includes

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<sup>58</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, [2010] ICJ Rep 403 at para 122. In order to conclude that Kosovo's unilateral declaration of independence was in accordance with international law, the ICJ deemed it sufficient to establish a lack of any legal prohibition. Some, notably Judge Simma, have criticized this seeming reliance on the Lotus principle. In his separate declaration, Simma accused the ICJ of “upholding the Lotus principle [thus] fail[ing] to seize a chance to move beyond this anachronistic, extremely consensualist vision of international law.” (See *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Declaration of Judge Simma, [2010] ICJ Rep 403 at 479).

<sup>59</sup> Alison Pert, “Australia's Jakarta Phone-Tapping: Was it Illegal?” *Inside Story* (27 November 2013), online: [Insidestory.org <http://insidestory.org.au/australias-jakarta-phone-tapping-was-it-illegal>](http://insidestory.org.au/australias-jakarta-phone-tapping-was-it-illegal) [Pert]; Skinner, *supra* note 31 at 1182-83.

<sup>60</sup> Forcese, “Spies Without Borders”, *supra* note 26 at 185, 201-05. He argues that the “international law of spying is best described as ‘underdeveloped’”.

<sup>61</sup> In public international law only the *Hague Convention* on the laws and customs of war on land of 1907 (articles 29-31) and the *Geneva Conventions* of 1949 deal with spying and spies- however these treaties only apply to espionage in times of war. *Convention (IV) Respecting the Laws and Customs of War on Land*, 18 October 1907, 187 CTS 227; *Geneva Convention relative to the treatment of prisoners of war*, 12 August 1949, 75 UNTS 136; *Geneva Convention for the amelioration of the condition of the wounded, sick and shipwrecked members of the armed forces at sea*, 12 August 1949, 75 UNTS 86; *Geneva Convention relative to the protection of civilian persons in time of war*, 12 August 1949, 75 UNTS 288; *Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field*, 12 August 1949, 75 UNTS 32. See also Falk, *supra* note 37 at 80-81; Talmon, *Sachverständigen Gutachten*, *supra* note 25 at 16; Skinner, *supra* note 31 at 1181-1182; Chesterman, *supra* note 26 at 1073-74; Mack, *supra* note 31 at 3; Forcese, “Spies Without Borders”, *supra* note 26 at 181-84. He correctly points out that spying is not a “legal”, but rather a “colloquial term”.

only the gathering by one State of another State's secret, not publicly available information. Some want to include the gathering of information from open sources, but usually go on to exclude such activities from their legal discussion. Others believe espionage includes the analysis of the information thus obtained. Others again, believe espionage includes covert actions undertaken against another State's government, though most authors again attempt to exclude such actions from their analysis. Then there are various possible scenarios as far as the actors and victims of peacetime espionage are concerned: some only want to discuss espionage by a State directed against another State, others include economic espionage directed against non-State actors when conducted by a State and others again include espionage by non-State actors against other non-State actors.<sup>62</sup> As Romero has summarized, "[e]spionage and intelligence collection will mean something different to each nation".<sup>63</sup> Based on this hazy view of what "espionage" actually means, it is no surprise that there is no agreement as to the legality or illegality of such conduct.

Furthermore, the nature of espionage has radically changed in the course of time. Traditionally, espionage mainly involved "cloak-and dagger-spies" who were operating in foreign countries and attempting to steal information or to otherwise illicitly obtain secret information, for example, by bribing foreign officials.<sup>64</sup> Such conduct, of course, still takes place, as illustrated by the accusations levelled against the USA. However, modern day espionage is more frequently conducted remotely, by satellite or cyber espionage, often without the "spy" ever leaving his home country, raising different legal issues than the traditional forms of spying.<sup>65</sup>

And, lastly, there is also no need for specific international legal rules on espionage. Most, if not all (and certainly the spying activities discussed here), are illegal in public international law under widely accepted, more general rules in customary international law.<sup>66</sup> There is no need for a specific rule on espionage,

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<sup>62</sup> Providing various, often conflicting definitions of espionage: Sanchez, *supra* note 28 at 1-2 (he wants to distinguish between six different kinds of intelligence gathering which, according to him, all have "potential implications for international law"); Gusy, *supra* note 43 at 195-96 (who attempts to differentiate between "simple spying" and other activities); Stein & Maruhn, *supra* note 43 at 1-40. They attempt to distinguish between various kinds of "information operations" (aggression, offensive, information technology as a weapon, etc. while only equating the "offensive information operations" with espionage). Baker, *supra* note 26 at 1093-94; Forcese, "Spies Without Borders", *supra* note 26 at 181-84 (he also provides a table explaining six different types of intelligence collection); Stefan Kirchner, "Beyond Privacy Rights: Crossborder Cyber-Espionage and International Law" (2014) 31:3 John Marshall Journal of Information Technology and Privacy Law 369 at 370-71 [Kirchner]. He seems to include a broad variety of activities in his definition of espionage. Mack, *supra* note 31 at 6. He provides a detailed interpretation of "espionage", including some, while excluding other activities. Radsan, *supra* note 26 at 599-601; Romero, *supra* note 29 at 15, 17, 33-38; Shoshan, *supra* note 18 at 14-15; Sulmasy & Yoo, *supra* note 29 at 625.

<sup>63</sup> Romero, *supra* note 29 at 9.

<sup>64</sup> Falk, *supra* note 37 at 50.

<sup>65</sup> Falk, *supra* note 37 at 50-51 (referring to satellites); Kirchner, *supra* note 62 at 369-78; Mack, *supra* note 31 at 25-26; Romero, *supra* note 29 at 33-38; Shoshan, *supra* note 18 at 7-8, 13-14.

<sup>66</sup> Pert, *supra* note 59 at 2; Korff, *supra* note 37 at 6 (limited to spying activities that amount to the "deliberate" commission of "criminal offences" in the "targeted state" and that harm that state's "interests"; however, that would cover most acts of espionage); Chesterman, *supra* note 26 at 1127. He refers to a "normative context [...] within which intelligence collections takes place"; Forcese, "Spies



which helps explain the lack of state practice as far as explicit condemnations of espionage as illegal are concerned. It can even be argued that the discussion centred on the legality of espionage is used as a smokescreen in order to be able to claim that there are no clear legal rules, which seemingly implies the legality of such conduct.

Nevertheless, even if the following conclusions as to the legality of the various forms of espionage may be identical in all the instances discussed here, the respective legal reasoning may well differ from case to case. As the various spying activities the USA is alleged to have been conducting against Germany illustrate, activities associated with espionage cannot simply be lumped together and judged uniformly. This will be discussed next.

## **B. The legality of US spying activities against Germany**

As outlined in the introduction, the USA is accused of specific espionage activities as far as Germany is concerned, which will now be analysed in turn.

### **1. BRIBING OF GERMAN CIVIL SERVANTS**

There can be no doubt that the bribing of a German civil servant, working for Germany's BND, in order to obtain confidential or secret information, was a clear violation of public international law.

By acting in such a way the USA disregarded Germany's sovereignty. Although it is difficult to provide a precise definition of the term "sovereignty" as understood in public international law today,<sup>67</sup> there is no serious doubt that sovereignty includes a State's right to demand respect for its territorial integrity and political independence.<sup>68</sup>

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Without Borders", *supra* note 26 at 209. He states: "public international law rules pertaining to spying are best described as a checkerboard of principles, constraining some practices in some places and in relation to some actors, but not in other cases in relation to other actors"; Kirchner, *supra* note 62 at 372. He claims that there is no "general rule" in international law as far as espionage is concerned, but that there are "specific rules concerning espionage under specific conditions or 'situation[s]'", Shoshan, *supra* note 18 at 14, 30-31; Wrangle, *supra* note 47 at 12.

<sup>67</sup> The precise meaning and scope of the term "sovereignty" in international law need not be examined in this context. It should, however, be pointed out that the concept as such is a much contested one. See, for example: Matthew C R Craven, *The Decolonization of International Law: State Succession and the Law of Treaties* (Oxford: Oxford University Press, 2007) at 7-92; Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge: Cambridge University Press, 2008) at 109-211; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2007).

<sup>68</sup> Article 2 (4), *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7 [*UN Charter*]; Article 10, *1919 Covenant of the League of Nations*, 29 April 1919, UKTS 1919 No 4. See also Quincy Wright, *supra* note 38 at 24; Stein & Marauhn, *supra* note 43 at 23-24; Chesterman, *supra* note 26 at 1081-82; Forcese, "Spies Without Borders", *supra* note 26 at 185, 198; John Kish, David Turns, ed., *International Law and Espionage* (The Hague: Martinus Nijhoff Publishers, 1995) at 83-84 [Kish]; Shoshan, *supra* note 18 at 32-34.

In 1949, the ICJ stressed the importance of the concept of sovereignty by stating that “between independent states, respect for territorial sovereignty is an essential foundation of international relations”.<sup>69</sup> This includes a State’s right to govern effectively to the exclusion of other States so that a State has no right to act on another State’s territory without that State’s permission.<sup>70</sup> This was confirmed by the PCIJ in 1927 when it declared that:

Now the first and foremost restriction imposed by international law upon a state is that -failing the existence of a permissive rule to the contrary- it may not exercise its power in any form in the territory of another state.<sup>71</sup>

The arbitrator in the *Las Palmas Case* was even more explicit:

Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.<sup>72</sup>

Should the allegations be confirmed in the upcoming trial, the USA will therefore be responsible for violating Germany’s sovereignty. By bribing a German civil servant and thereby instigating that person to obtain and possibly hand over confidential information on German territory, the USA’s secret service exercised executive or governmental power on German territory without Germany’s permission.<sup>73</sup> Without doubt, state responsibility was incurred by the USA: the US

<sup>69</sup> *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v Albania)*, [1949] ICJ Rep 4 at 35 [*Corfu Channel Case*]. See also *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, [2005] ICJ Rep 168 at para 165 [*Armed Activities on the Territory of the Congo*], for example.

<sup>70</sup> Pert, *supra* note 59 at 2-3; Korff, *supra* note 37 at 4-5; Forcese, “Spies Without Borders”, *supra* note 26 at 185, 198; Kish, *supra* note 68 at 83; Shoshan, *supra* note 18 at 32-34, 37; Wrang, *supra* note 47 at 5; Wolff Heintschel von Heinegg, “Legal Implications of Territorial Sovereignty in Cyberspace” (2012) 4th International Conference on Cyber Conflict at 8, online: CCDCOE.org <[https://ccdcOE.org/publications/2012proceedings/1\\_1\\_von\\_Heinegg\\_LegalImplicationsOfTerritorialSovereigntyInCyberspace.pdf](https://ccdcOE.org/publications/2012proceedings/1_1_von_Heinegg_LegalImplicationsOfTerritorialSovereigntyInCyberspace.pdf)> [von Heinegg].

<sup>71</sup> *The Case of the SS “Lotus”*, *supra* note 27 at 18.

<sup>72</sup> *Netherlands v USA* (1928), 2 *Reports of International Arbitral Awards* 829 at 838, online: United Nations <[http://legal.un.org/riaa/cases/vol\\_II/829-871.pdf](http://legal.un.org/riaa/cases/vol_II/829-871.pdf)>.

<sup>73</sup> Korff, *supra* note 37 at 5; Donald K Anton, “The Timor Sea Treaty Arbitration: Timor-Leste Challenges Australian Espionage and Seizure of Documents” (2014) 18:6 *American Society of International Law Insights* 1 at 3, online: IILJ.org <<http://www.iilj.org/courses/documents/Anton-ASILInsightonTimor-LesteAustralia.pdf>> [Anton]. For other views, see Gusy, *supra* note 43 at 192-94. Gusy claims that a State’s exclusive right to exercise governmental functions within its territory only prohibits a foreign State from engaging in activities which impede the target State’s exercise of governmental authority. He goes on to argue that a foreign State’s espionage activities regularly do not limit a State’s ability to govern effectively and therefore do not violate territorial sovereignty. However, this argument is not convincing, as it contradicts the generally accepted definition of territorial sovereignty, which prohibits the exercise of power by a foreign State on another State’s territory “in any form”. An actual impediment is not required. Romero, *supra* note 29 at 44. Romero

government employees instructing the German spy were representatives and therefore agents of the USA; via these agents who instructed the spy to obtain specific confidential secret information and offered payment in return, the USA also exerted effective control<sup>74</sup> over the spy.

Also, the agents acting for the USA when approaching and meeting the German civil servant on German territory in order to collect confidential material were themselves violating German law and participating in the commission of crimes by the civil servant. There can be no doubt that the USA, by bribing the BND employee, instigated him to break his own country's domestic laws.<sup>75</sup> A State whose agents themselves commit a criminal offence in another State or instigate a criminal to steal, kidnap or murder in another State violates public international law. Such physical activity by State agents on another State's territory obviously amounts to a blatant violation of the target State's "enforcement jurisdiction".<sup>76</sup> This also applies to the crimes discussed here: as Korff has explained

if agents of one state (the spying state) deliberately commit criminal offenses in another state (the targeted state) that harm the interests of the targeted state and its citizens and officials, that constitutes an internationally wrongful act on the part of the spying State.<sup>77</sup>

While there may well be exceptions to this rule as far as the violation of domestic laws that disregard basic human rights are concerned, there is no reason to assume that this is the case with treason or espionage.<sup>78</sup> By acting in such a way, the USA, represented by its agents, was therefore acting unlawfully under public international law.<sup>79</sup>

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relies on the clean-hands-principle in order to negate a violation of territorial sovereignty, an argument which will be dealt with later.

<sup>74</sup> See Article 8 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Report of the International Law Commission, GA Res, UNGAOR, 56<sup>th</sup> Sess, Supp No 10, UN Doc A/56/10, (2001) 3 at 45; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, [1986] ICJ Rep 14 at para 115 [*Case Concerning Military and Paramilitary Activities in and against Nicaragua*] and *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, [2007] ICJ Rep 43 at paras 392, 398, 407. See also Gusy, *supra* note 43 at 189-90; Wrangle, *supra* note 47 at 6.

<sup>75</sup> Sections 94 and 99 of the *German Criminal Law Code*, trans by Michael Bohlander (2015), online: Bundesministerium der Justiz und für Verbraucherschutz <[https://www.gesetze-im-internet.de/englisch\\_stgb/](https://www.gesetze-im-internet.de/englisch_stgb/)> [*German Criminal Law Code*].

<sup>76</sup> Craig Forcece, "The Ugly Canadian? International Law and Canada's New Covert National Security Vision" (Lecture delivered at the CBA National Section on International Law Notes, 28 May 2015), online: Craig Forcece <<http://craigforcece.squarespace.com/national-security-law-blog/2015/5/28/the-ugly-canadian-international-law-and-canadas-new-covert-n.html>>.

<sup>77</sup> Korff, *supra* note 37 at 6. Very similar: Quincy Wright, *supra* note 38 at 13 ("It belongs to each state to define peacetime espionage, sedition, subversion, [...] as it sees fit, and it is the duty of other states to respect such exercise of domestic jurisdiction. Thus any act by an agent of one state committed in another state's territory, contrary to the laws of the latter, constitutes intervention, provided those laws are not contrary to the state's international obligations").

<sup>78</sup> Quincy Wright, *supra* note 38 at 12-13.

<sup>79</sup> Korff, *supra* note 37 at 6; Quincy Wright, *supra* note 38 at 12; Wrangle, *supra* note 47 at 13.

A Canadian Federal Court has best summarized the legal situation. In response to an application by the Canadian Security Service (CSIS) for a warrant to engage in investigative activities in another State, the Court, in rejecting the application, held:

The intrusive activities that are contemplated in the warrant sought are activities that clearly impinge upon the above-mentioned principles of territorial sovereign equality and non-intervention and are likely to violate the laws of the jurisdiction where the investigative activities are to occur... By authorizing such activities, the warrant would therefore be authorizing activities that are inconsistent with and likely to breach the binding customary principles of territorial sovereign equality and non-intervention, by the comity of nations. These prohibitive rules of customary international law have evolved to protect the sovereignty of nation states against interference from other states... Extraterritorial jurisdiction, prescriptive, enforcement or adjudicative, exists under international law and is subject to the strict limits under international law based on sovereign equality, non-intervention and the territorial principle.<sup>80</sup>

By bribing the government official via its agents, the USA thus exerted its governmental authority on another State's territory. Instigating a foreign citizen to break his own country's laws on that country's territory clearly ignored the USA's obligation to respect Germany's jurisdiction in its territory, thereby disregarding Germany's sovereignty and violating public international law.

## 2. SPYING FROM WITHIN THE US EMBASSY IN BERLIN, THE US CONSULATE IN FRANKFURT AND/OR US MILITARY BASES: INSTALLATION OF SPY WARE ON COMPUTERS IN GERMANY

Again there can be no doubt that such actions, if proved correct, violate public international law.<sup>81</sup> Such espionage activities violate Germany's sovereignty as American government agencies were acting on German territory without German approval.<sup>82</sup> In that respect the arguments already set out above can be referred to.

<sup>80</sup> *Re Canadian Security Intelligence Service Act*, *supra* note 47 49-55 (quotes paras. 49, 51, 54).

<sup>81</sup> Philip Oltermann, Julian Borger & Nicholas Watt, "Germany calls in UK ambassador over spy claims" *The Guardian* (5 November 2013), online: [TheGuardian.com <http://www.theguardian.com/world/2013/nov/05/germany-summons-uk-ambassador-spy-claims-berlin>](http://www.theguardian.com/world/2013/nov/05/germany-summons-uk-ambassador-spy-claims-berlin); Korff, *supra* note 37 at 6.

<sup>82</sup> *Re Canadian Security Intelligence Service Act*, *supra* note 47, 49-55; Pert, *supra* note 59 2-3; Korff, *supra* note 37 at 6; Kish, *supra* note 68 at 83-84. For a different view see Brown & Poellet, *supra* note 29 at 133-34. They argue that "state practice does not prohibit spying that might involve crossing international borders". They claim that "state practice" has led "to the establishment of an exception to traditional rules of sovereignty". As already pointed out, this argument is unconvincing. An exception to the "traditional rules of sovereignty" as a rule of customary international law could only have been created if the State practice Brown and Poellet claim exists had been accompanied by corresponding *opinio juris*. This, however, is not the case as has already been explained.

Monitoring German government communication from diplomatic premises further violates the *Vienna Convention on Diplomatic Relations*.<sup>83</sup> According to Article 41 (3), “the premises of the mission must not be used in any manner incompatible with the functions of the mission as laid down in the present Convention or by other rules of general international law or by any special agreements in force between the sending and the receiving State”<sup>84</sup>. Permissible functions of the mission are laid down in Article 3. As far as the gathering of information is concerned, Article 3 (d) states that one such function is the “ascertaining *by all lawful means* conditions and developments in the receiving State, and reporting thereon to the Government of the sending State.” [Emphasis added.]<sup>85</sup> Furthermore, Article 41 (1) obliges all diplomats “to respect the laws and regulations of the receiving State” and “not to interfere in the internal affairs of that State”<sup>86</sup>. There can be no doubt that intercepting the German government’s internal communications without permission violated German domestic law<sup>87</sup> which therefore also was incompatible with Article 41 (1), 41 (3) and 3 (d) of the *Vienna Convention on Diplomatic Relations*.<sup>88</sup>

The alleged spying activities from within the Frankfurt Consulate allow no other conclusion. Such conduct violates Articles 55 (1), 55 (2) and 5 (c) of the *Vienna Convention on Consular Relations*.<sup>89</sup> Article 55 (1) obliges all diplomats to respect the receiving State’s “laws and regulations” while Article 55 (2) prohibits the use of the “consular premises [...] in any manner incompatible with the exercise of consular functions” as defined in Article 5.<sup>90</sup>

As far as any US spying activity is/was conducted from within American military bases in Germany, such actions would also violate the *North Atlantic Treaty Organization Status of Forces Treaty*.<sup>91</sup> Under Article II, all members of North Atlantic Treaty Organization (NATO) forces deployed to other member States as well as any “civilian component” are required to respect the laws of the “receiving state” (Germany) which, of course, include the criminal laws prohibiting espionage.

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<sup>83</sup> Pert, *supra* note 59 at 3; Talmon, *Sachverständigengutachten*, *supra* note 25 at 21-22; Talmon, “Das Abhören”, *supra* note 28 at 8; Aust, *supra* note 43 at 15; Helmut Kreicker, “Konsularische Immunität und Spionage” (2014) No 3 *Zeitschrift für internationale Strafrechtsdogmatik* 129; Chesterman, *supra* note 26 at 1087-90; Forcese, “Spies Without Borders”, *supra* note 26 at 200; Kirchner, *supra* note 62 at 373-74; Sanderijn Duquet & Jan Wouters, “Legal Duties of Diplomats Today: The Continuing Relevance of the Vienna Convention” (2015) *Leuven Centre for Global Governance Studies Working Paper No 146* at 19-20; *Vienna Convention on Diplomatic Relations*, 18 April 1961, 500 UNTS 96.

<sup>84</sup> *Vienna Convention on Diplomatic Relations*, *supra* note 83.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> Section 99 of the *German Criminal Law Code*, *supra* note 75.

<sup>88</sup> *US Diplomatic and Consular Staff in Tehran (USA v Iran)*, *supra* note 24; *Vienna Convention on Diplomatic Relations*, *supra* note 83.

<sup>89</sup> *US Diplomatic and Consular Staff in Tehran*, *supra* note 24; *Vienna Convention on Consular Relations*, 24 April 1963, 596 UNTS 262.

<sup>90</sup> Article 5 (c) only permits the gathering of information in the receiving state “by all lawful means”. *Vienna Convention on Diplomatic Relations*, *supra* note 83.

<sup>91</sup> *Agreement between the Parties to the North Atlantic Treaty regarding the Status of their forces*, 19 June 1951, 199 UNTS 67; Talmon, *Sachverständigengutachten*, *supra* note 25 at 23; Talmon, “Das Abhören”, *supra* note 28 at 8-10.

Article VII leaves no doubt that members of the US military in Germany are not permitted to engage in acts of “espionage” when in Germany: paragraph 2 grants the receiving State “exclusive jurisdiction” as far as the prosecution of “offenses relating to the security” of the receiving State are concerned, while paragraph 3 states that both “treason against the state” and “espionage” are to be viewed as such offences. The obligation of both Germany and the USA to cooperate on issues relating to the security of the sending State’s military forces and those forces’ right to install/erect means of telecommunication within Germany, contained in the Supplementary Agreement to the Status of Forces Agreement (SOFA),<sup>92</sup> provide no justification for spying in Germany without the German authorities’ consent.<sup>93</sup>

If the allegations are correct there can again be no doubt that Germany can rightfully accuse the USA of having violated public international law.

### 3. SPYING ON GERMAN GOVERNMENT COMMUNICATIONS FROM WITHIN THE UNITED STATES (CYBER ESPIONAGE)

Without doubt, this is the most controversial category of allegations as far as public international law is concerned. In this instance, it seems more difficult to simply assert that the USA violated German territorial sovereignty as the US government officials involved in this spying activity may have never left the United States, let alone entered Germany, in order to engage in these activities. The physical presence of a State agent on a foreign State’s territory is therefore lacking here in contrast to the two scenarios discussed so far. Rather, the US officials most likely intercepted international wireless communications from military or other bases situated in the USA. Therefore the claim that German territorial sovereignty was and is being violated becomes less easy to sustain.<sup>94</sup> The European Court of Human Rights (ECtHR) negated any violation of sovereignty in a related, though not identical case:

Signals emitted from foreign countries are monitored by interception sites situated on German soil and the data collected are used in Germany. In the light of this, the Court finds that the applicants failed to provide proof in the form of concordant inferences that the German authorities, by enacting and applying strategic monitoring measures, have acted in a manner which interfered with the territorial sovereignty of foreign States as protected in

<sup>92</sup> *NATO SOFA Supplementary Agreement* (1959), 490 UNTS 30 (Articles 3 para 2 (a) and 60).

<sup>93</sup> Talmon, *Sachverständigengutachten*, *supra* note 25 at 23-24; Talmon, “Das Abhören”, *supra* note 28 at 9.

<sup>94</sup> Falk, *supra* note 37 at 50-51 (as far as espionage by satellite is concerned); Pert, *supra* note 59 at 2-3; Talmon, *Sachverständigengutachten*, *supra* note 25 at 19-20; Talmon, “Das Abhören”, *supra* note 28 at 10; Korff, *supra* note 37 at 7; Stein & Maruhn, *supra* note 43 at 32-33. For another view, see Peters, *supra* note 48 at 2. She indicates that she views the spying on communications in Germany even from within the USA as the exercise of US jurisdiction in Germany, which, according to her, might amount to a violation of Germany’s sovereignty. See also Shoshan, *supra* note 18 at 36-38. She makes the interesting argument that communications that can clearly be identified as government communications (such as e-mail addresses with the Internet address “.gov”) are subject to that state’s sovereignty. Possibly Shull, *supra* note 47 at 5; von Heinegg, *supra* note 70 at 9-13.

public international law.<sup>95</sup>

Nevertheless, it could well be argued that the intrusion by US officials into data stored on servers located on German soil amounts to a violation of Germany's territorial sovereignty because they are hereby, albeit remotely, exercising US governmental authority on German territory without German consent.<sup>96</sup>

Yet the fact is that many Internet providers available in Germany store data on servers located abroad, rendering the above argument obsolete.<sup>97</sup> Furthermore, it seems that the USA has the capability of real-time monitoring of Internet communications.<sup>98</sup> Such real-time monitoring, however, has far-reaching consequences as far as a possible violation of territorial sovereignty is concerned: after all, even e-mail communication between users resident in the same country are often routed via various servers located in a number of States.<sup>99</sup> This, of course, means that, irrespective of whether the data ends up being stored on a server located on German territory, it becomes impossible to infer when and where the information was actually obtained. Rather, the gathering of information in such circumstances on non-German territory would be comparable to the case decided by the ECtHR mentioned above, which negated a violation of sovereignty. It is therefore necessary to review whether other rules of public international law may be implicated by such monitoring and information gathering activities.

One such rule is the by now well-established prohibition of any intervention in the internal affairs of another State.<sup>100</sup> According to Article 8 of the *Montevideo Convention on the Rights and Duties of States*, concluded already in 1933, "no state

<sup>95</sup> *Weber and Saravia v Germany* (2006), 54934/00 ECHR (Ser A) 309 at para 88 [*Weber and Saravia v Germany*]. Very similar: *X (Re)*, [2010] 1 FCR 460, 2009 FC 1058.

<sup>96</sup> International Telecommunication Union, *Understanding Cybercrime: Phenomena, Challenges and Legal Response, Report* (September 2012) at 277-278, online: ITU.int <<http://www.itu.int/ITU-D/cyb/cybersecurity/docs/Cybercrime%20legislation%20EV6.pdf>>; Shoshan, *supra* note 18 at 36-39. Probably Peters, *supra* note 48 at 2. Also see Rule 1, Michael N Schmitt, ed, *Tallinn Manual on the International Law Applicable to Cyber Warfare* (2013) Cambridge University Press at 15, online: ISSUU.com <[https://issuu.com/nato\\_ccd\\_coe/docs/tallinnmanual/35?e=0/1803379](https://issuu.com/nato_ccd_coe/docs/tallinnmanual/35?e=0/1803379)>.

<sup>97</sup> For example, Microsoft stores e-mails generated in Germany on servers located in Ireland. See Christian Kirsch, "Microsoft verteidigt Daten in Europa vor US-Zugriff" *Heise online* (10 September 2015), online: Heise.de <<http://www.heise.de/newsticker/meldung/Microsoft-verteidigt-Daten-in-Europa-gegen-US-Zugriff-2809638.html>>.

<sup>98</sup> Glenn Greenwald, "XKeyscore: NSA tools collect 'nearly everything a user does on the Internet'" *The Guardian* (31 July 2013), online: Theguardian.com <<http://www.theguardian.com/world/2013/jul/31/nsa-top-secret-program-online-data>>; "NSA sucks realtime data from fifty companies" *Daily Mail* (9 June 2013), online: Mail Online <<http://www.dailymail.co.uk/news/article-2338367/NSA-sucks-realtime-data-FIFTY-companies.html>>.

<sup>99</sup> Patrick Beuth, "NSA kann drei von vier E-Mails mitlesen" *Zeit Online* (21 August 2013), online: Zeit.de <<http://www.zeit.de/digital/datenschutz/2013-08/nsa-ueberwacht-75-prozent-internet>>; Charles Arthur, "NSA-Scandal: what data is being monitored and how does it work?" *The Guardian* (7 June 2013), online: Theguardian.com <<http://www.theguardian.com/world/2013/jun/07/nsa-prism-records-surveillance-questions>>.

<sup>100</sup> Forcese, "Spies Without Borders", *supra* note 26 at 208. He mentions that a State may claim that there had been an "interference in its internal affairs" in cases of – what he refers to as – "transnational spying". It is, however, not clear, whether he believes such a claim would be justified. Wrangle, *supra* note 47 at 7-8.

has the right to intervene in the internal or external affairs of another.”<sup>101</sup> Following World War II this rule of customary international law was repeatedly confirmed. Article 2 (7) of the *UN Charter* rules out any the intervention by the UN in a member State’s internal affairs<sup>102</sup>. Article 19 of the *Charter of the Organization of American States*, concluded in 1948, stated:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.<sup>103</sup>

Similarly, Article 8 of the *Warsaw Treaty Organization* (1955) declared that:

The Contracting Parties declare that they will act in a spirit of friendship and cooperation with a view to further developing and fostering economic and cultural intercourse with one another, each adhering to the principle of respect for the independence and sovereignty of the others and non-interference in their internal affairs.<sup>104</sup>

Following these regional treaties a broad international consensus on the prohibition of intervention in another State’s internal affairs developed. In 1965, the General Assembly passed the *Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty* by a 109:0:1 vote. *Inter alia*, it stated that:

1. No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned.<sup>105</sup>

These sentiments were reaffirmed in the 1970 General Assembly’s *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the UN Charter*, which was passed without a vote:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other

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<sup>101</sup> *Convention on Rights and Duties of States adopted by the Seventh International Conference of American States*, 26 December 1933, 165 LNTS 19.

<sup>102</sup> *UN Charter*, *supra* note 68.

<sup>103</sup> *Charter of the Organization of American States*, 30 April 1948, 119 UNTS 47 [*OAS Charter*].

<sup>104</sup> *Treaty of friendship, co-operation and mutual assistance between the People’s Republic of Albania, the People’s Republic of Bulgaria, the Hungarian’s People’s Republic, the German Democratic Republic, the Polish People’s Republic, the Romanian People’s Republic, the Union of Soviet Socialist Republic and the Czechoslovak Republic*, 14 May 1955, 219 UNTS 23.

<sup>105</sup> *Declaration of the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty*, GA Res 2131 (XX), UNGAOR, 20<sup>th</sup> Sess, UN Doc A/6220 (1965).



State.<sup>106</sup>

Although these resolutions were not legally binding as such, the fact they were passed by consensus, with the latter explicitly referring to international law, allows the conclusion that States viewed the content of the Declaration as being reflective of their interpretation of the international legal rules. It is therefore justified to view the prohibition on intervention in the internal or external affairs of another state as a rule of customary international law.<sup>107</sup> In 2005, the ICJ in fact confirmed that the *Friendly Relations Resolution* was “declaratory of international law”.<sup>108</sup>

The ICJ has also repeatedly stressed the legal quality of the prohibition of such interventions. As early as 1949, only shortly after the ICJ was created, the Court expressly deemed interventions in other States’ affairs as unlawful.<sup>109</sup> In the *Nicaragua Case*, in 1986, the ICJ went into more detail by providing at least a partial definition of the prohibition on interventions:

The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference; though examples of trespass against this principle are not infrequent, the Court considers that it is part and parcel of customary international law.<sup>110</sup>

However, the Court also seemed to limit the application of the prohibition by stating that:

A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful *when it uses methods of coercion* in regard to such choices, which must remain free ones.<sup>111</sup> [Emphasis added.]

It should, however, be pointed out that the ICJ emphasized that it was not providing a complete and definitive definition of the term. Rather, it only dealt with “those aspects of the principle which appear to be relevant” to the case before it.<sup>112</sup> Yet, as far as the allegations against the USA are concerned, many doubt that the coercive element demanded by the ICJ is present when US spying activities,

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<sup>106</sup> *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res 2625 (XXV), UNGAOR, 25<sup>th</sup> Sess, UN Doc A/8082 (1970) [*Friendly Relations Resolution*].

<sup>107</sup> Forcese, *supra* note 26 at 198; Shull, *supra* note 47 at 3-4.

<sup>108</sup> *Armed Activities on the Territory of the Congo*, *supra* note 69 at para 162.

<sup>109</sup> *Corfu Channel Case*, *supra* note 69 at 34-35.

<sup>110</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, *supra* note 74 at para 202. See also *Armed Activities on the Territory of the Congo*, *supra* note 69 at paras 161-165.

<sup>111</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, *supra* note 74 at para 205. See also Shull, *supra* note 47 at 4.

<sup>112</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, *supra* note 74 at para 205. See also Shull, *supra* note 47 at 4.

conducted from within the USA, are considered.<sup>113</sup>

Nevertheless, at a basic level there can be little doubt that this requirement is met. After all, it is self-evident that it is a State's prerogative and sovereign right, as part of its foreign policy, to decide what information it shares with other States, whether these are allies or foes. A sovereign government has the right to develop its domestic and foreign affairs policies unobserved by a foreign power. By denying the German government that right, the USA forces Germany to—unwittingly—disclose what it, as a sovereign State, has decided not to disclose in pursuit of its foreign, trade or domestic policy goals. By trying to obtain internal communications which the German government obviously did not want to share with the USA, Germany is robbed of the opportunity of making a sovereign decision on whom it wants to share these secret government deliberations with.<sup>114</sup>

Furthermore, the collection of such information should not be assessed separately from the spying State's motives for doing so.<sup>115</sup> It is sometimes argued that the reason for collecting information may well be incompatible with international law, but that this did not touch upon the issue of whether the collection as such was illegal under public international law.<sup>116</sup>

There is no reason to assume that to view a State's motives as largely irrelevant is always and wholly correct. It cannot be disputed that a State's motives may, in some cases, not be decisive when judging whether its actions were lawful or unlawful.<sup>117</sup> However, there are also cases where the opposite is true: a State's armed response to an armed attack will be judged differently based on whether that response

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<sup>113</sup> Schmalenbach, *supra* note 45 at 29-30; Aust, *supra* note 43 at 16; Peters, *supra* note 48 at 2; Shoshan, *supra* note 18 at 43-45; Talmon, *Sachverständigen Gutachten*, *supra* note 25 at 20-21. Talmon also bases his view on the ICJ's reasoning in the *Nicaragua Case*. When dealing with unauthorized overflights over Nicaraguan territory by US planes, the Court concluded that such conduct violated Nicaragua's sovereignty but did not deal with the question of whether these flights also amounted to an unlawful intervention. This argument is unconvincing. The ICJ had no reason to examine whether these reconnaissance flights constituted an unlawful intervention or not. Nicaragua claimed that its sovereignty had been violated by the flights, the Court concurred. Therefore, there was no need for the Court to examine any further the USA's conduct in this respect (*Case Concerning Military and Paramilitary Activities in and against Nicaragua*, *supra* note 74 at paras 87-91, 251). See also Talmon, "Das Abhören", *supra* note 28 at 10. For a more general discussion of the difficulty of distinguishing between -acceptable- "persuasion" of another State and "coercion". Also see Stein & Marauhn, *supra* note 43 at 22-25.

<sup>114</sup> Shoshan, *supra* note 18 at 45-47; Shull, *supra* note 47 at 6-7; Wrangle, *supra* note 47 at 8-9. Although Wrangle bases this conclusion on the fact that the agent, operating remotely from his own country, nevertheless is violating the domestic laws of the target state and is therefore guilty of an illegal intervention. Schmalenbach, *supra* note 45 at 30. She mentions this argument but it remains unclear whether she agrees with it or not.

<sup>115</sup> Falk, *supra* note 37 at 58; Pert, *supra* note 59 at 2; Shull, *supra* note 47 at 5.

<sup>116</sup> Schmalenbach, *supra* note 45 at 30; Shoshan, *supra* note 18 at 45.

<sup>117</sup> *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v United States of America)*, "Memorial of the Islamic Republic of Iran" (24 July 1990), ICJ Pleadings at 197-208. The Memorial mentions many incidents when the accused State's motives were viewed as irrelevant when assessing the legality of that State's actions.

was defensive in nature (lawful self-defence) or rather punitive (unlawful reprisal).<sup>118</sup> Similarly, an intervention justified on the grounds of the controversial doctrine of humanitarian intervention/the Responsibility to Protect will only not be judged as an unlawful intervention if the action was motivated by humanitarian concerns.<sup>119</sup>

As far as the collection of secret information against another State's wishes in order to influence that State's foreign policy or gain an upper hand in negotiations with that State are concerned, there is every reason to consider the prying State's motives when judging the legality of the monitoring activity.<sup>120</sup> It is completely infeasible that a State would attempt to collect another State's secret government communications just to subsequently file them away. A State that is spying on another State in order to obtain information on the victim State's foreign policy will be doing so in order to thwart foreign policy initiatives viewed as contrary to the spying State's national interest, most certainly also by exerting pressure on politicians to make them change their minds. To that end, it is easily imaginable that private information on foreign politicians obtained by, for example, intercepting their e-mail communications might come in useful for a State wanting to persuade those politicians to adopt a more amenable view on issues of foreign or trade policy. Such action would undoubtedly contain the necessary coercive element as far as an illegal intervention in another State's internal affairs is concerned. Another State's secret information is being collected in order to prevent that State from pursuing foreign or trade policy goals contrary to the spying State's interests.<sup>121</sup> It follows that the collection of information cannot be judged separately from that collection's motives and aims, but must rather be seen as the initiation of the illegal intervention in the other State's affairs and as such as an indispensable (enabling) part of that intervention.

If it is true, as claimed, that US spying on German politicians was mainly concerned with Germany's policy on Iran and Russia,<sup>122</sup> there can be little doubt that such espionage was being conducted in order to thwart any possible German policy initiatives contrary to US goals in these specific areas. In fact, some US politicians and officials have indeed justified US spying on Germany as based on Germany's

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<sup>118</sup> Christine Gray, *International Law and the Use of Force*, 3d ed (Oxford: Oxford University Press, 2008) at 203; Antonio Cassese, *International Law*, 2d ed (Oxford: Oxford University Press, 2005) at 299-302; W Michael Reisman, "The Raid on Bagdad: Some Reflections on its Lawfulness and Implications" (1994) 5:1 EJIL 120.

<sup>119</sup> See, for example, the Report by the UN Secretary-General on the implementation of the responsibility to protect, *Report of the Secretary-General*, UNGAOR, 63d Sess, UN Doc A/63/677, (2009).

<sup>120</sup> Pert, *supra* note 59 at 2; Stein & Marauhn, *supra* note 43 at 24; Baker, *supra* note 26 at 1097.

<sup>121</sup> For an example of US operations in that respect, see, for example, Martin Bright, Ed Vulliamy & Peter Beaumont, "Revealed: US dirty tricks to win vote on Iraq" *The Guardian* (2 March 2003), online: Theguardian.com <<http://www.theguardian.com/world/2003/mar/02/usa.iraq>>. Referring to US spying on UN diplomats representing States sitting on the Security Council at that time, the article explains: "The memo is directed at senior NSA officials and advises them that the agency is 'mounting a surge' aimed at gleaning information not only on how delegations on the Security Council will vote on any second resolution on Iraq, but also 'policies', 'negotiating positions', 'alliances' and 'dependencies' - the 'whole gamut of information that could give US policymakers an edge in obtaining results favourable to US goals or to head off surprises.'"

<sup>122</sup> Rosenbach & Stark, *supra* note 19 at 230-233.

past, allegedly unreliable policies on Russia and Iran.<sup>123</sup>

Lastly, the all-embracing collection of the German government's internal communications must also be seen as a violation of the principle of sovereign equality according to Article 2 (1) of the *UN Charter*.<sup>124</sup> This was certainly the preliminary view taken by the ICJ in a dispute between Australia and East Timor:

The principal claim of Timor-Leste is that a violation has occurred of its right to communicate with its counsel and lawyers in a confidential manner with regard to issues forming the subject-matter of pending arbitral proceedings and future negotiations between the Parties. The Court notes that this claimed right might be derived from the principle of the sovereign equality of States, which is one of the fundamental principles of the international legal order and is reflected in Article 2, paragraph 1, of the Charter of the United Nations. More specifically, equality of the parties must be preserved when they are involved, pursuant to Article 2, paragraph 3, of the Charter, in the process of settling an international dispute by peaceful means. If a State is engaged in the peaceful settlement of a dispute with another State through arbitration or negotiations, it would expect to undertake these arbitration proceedings or negotiations without interference by the other party in the preparation and conduct of its case. It would follow that in such a situation, a State has a plausible right to the protection of its communications with counsel relating to an arbitration or to negotiations, in particular, to the protection of the correspondence between them, as well as to the protection of confidentiality of any documents and data prepared by counsel to advise that State in such a context.<sup>125</sup>

Based on the ICJ's reasoning it must be assumed that the USA, too, violated that principle by deliberately obtaining government communications that, due to the almost universal nature of the monitoring, undoubtedly also contained information that touched upon Germany's bargaining positions as far as various negotiations that are being conducted between the two states (for example, the *Transatlantic Trade and Investment Partnership (TTIP)*) are concerned.<sup>126</sup> There can be no doubt that a State that has prior access to the other State's negotiating stance will be in a much stronger position during the ensuing negotiations than the victim State which is a violation of the principle of sovereign equality.<sup>127</sup>

<sup>123</sup> "NSA Skandal: US-Abgeordneter rechtfertigt Lauschangriffe" *Spiegel Online* (27 October 2013), online: Spiegel.de <<http://www.spiegel.de/politik/ausland/us-abgeordneter-peter-king-rechtfertigt-lauschangriffe-a-930292.html>>. Referring to US Representative Peter King, member of the Homeland Security Committee and Chairman of the Sub-Committee on Counterterrorism and Intelligence. "Warum die USA Schröder und Merkel abhörten" *Bild* (14 September 2014), online: Bild.de <<http://www.bild.de/politik/ausland/nsa/ex-nsa-chef-hayden-warum-die-usa-schroeder-und-merkel-abhoerten-37659540.bild.html>>. Interview with ex-NSA-Chief Michael Hayden.

<sup>124</sup> Quincy Wright, *supra* note 38 at 23; Schmalenbach, *supra* note 45 at 30-31; Peters, *supra* note 48 at 2.

<sup>125</sup> *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, Order of 3 March 2014, [2014] ICJ Rep 147 at para 27.

<sup>126</sup> Schmalenbach, *supra* no 45 at 30-31.

<sup>127</sup> Should Germany and the USA be concluding treaties in the near future, the all-encompassing espionage conducted by the USA might also raise good faith issues that could, *in extremis*, threaten the

It must therefore be concluded that even the collection of German government communications from within the USA violates public international law.

In summary, the USA's conduct towards Germany, if proven, was contrary to public international law in every instance discussed here. The employment of active spies on German territory, the monitoring of German government communications from within Germany, and, finally, such monitoring from within the USA have all been found to be unlawful.

### C. Justifications/Clean-Hands-Principle/Countermeasures

Sometimes, possible justifications for this alleged US conduct are discussed, such as Germany having granted its consent.<sup>128</sup> However, it is extremely far-fetched to plausibly argue that the German government or government agencies have at any time consented to the USA spying on confidential government communications. Why should the German government consent to such actions when it can freely choose what information it wishes to pass on to the USA? For the same reason, it can safely be assumed that the nebulous references to secret treaties, possibly allowing the USA to conduct such activities, are far from being based on facts.

It has also sometimes been argued that, as far as espionage is concerned, the "clean-hands-principle"<sup>129</sup> would make any claim of illegality by one State against another State untenable, as all States are guilty of espionage against other States.<sup>130</sup> This argument would also apply to the view adopted here, i.e., that the legality of individual actions needs to be examined rather than of espionage as such: most, if not all, States probably employ active spies abroad, sometimes monitor government communications from within the host State, and most certainly attempt to monitor such communications from within their own territory.<sup>131</sup>

Whether the clean-hands-principle has actually developed into a rule of customary international law either precluding the wrongfulness of another State's

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validity of such treaties. The ICJ has repeatedly stressed the importance, in public international law, of the principle of good faith when States are negotiating treaties. In fact, the ICJ has referred to it as "one of the basic principles governing the creation and performance of legal obligations". (*Nuclear Tests Case (Australia v France)*, [1974] ICJ Rep 253 at para 46). See also *North Sea Continental Shelf Cases*, *supra* note 46 at para 85; Anton, *supra* note 73 at 3.

<sup>128</sup> For further details, see Peters, *supra* note 48 at 3; Talmon, *Sachverständigengutachten*, *supra* note 25 at 23-26.

<sup>129</sup> A definition was provided by Judge Hudson in his *Individual Opinion* in the *River Meuse* Case before the PCIJ: "It would seem [...] that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party." *The Diversion of Water from the River Meuse (Netherlands v Belgium)*, Individual opinion of Mr Hudson (1937), PCIJ (Ser A/B) No 70 at 77. See also *The Diversion of Water from the River Meuse (Netherlands v Belgium)* (1937), PCIJ (Ser A/B) No 70 at 24-25.

<sup>130</sup> Schmalenbach, *supra* note 45 at 30-34, mentions this and some closely related arguments. Romero, *supra* note 29 at 19.

<sup>131</sup> As far as Germany is concerned, the *European Court of Human Rights* Judgment mentioned earlier in the text in fact expressly confirms this. *Weber and Saravia v Germany*, *supra* note 95.

actions or possibly as a factor in judging the admissibility of a claim put forward by the injured State, is contentious.<sup>132</sup> Even if the existence of such a rule were, however, presumed, it would have no role to play as far as US spying in Germany is concerned. It is generally agreed that the clean-hands-principle can only be invoked by the offending State if the reciprocal conduct is of a comparable “nature and gravity”.<sup>133</sup> However, it seems very likely that Germany, certainly prior to the Snowden revelations, undertook no or almost no spying activities to the disadvantage of the USA.<sup>134</sup> This explains German Chancellor Merkel’s initial reaction to information that the USA had been monitoring her mobile phone: “Spying on friends – that is completely unacceptable”.<sup>135</sup> In fact, the German security services have at times been criticized for this. Despite this, there are some indications that Germany may even introduce a law obliging the BND to spy on European partners only under those circumstances that would justify spying on a German citizen.<sup>136</sup> As far as German spying in States other than the USA is concerned, this would not justify US spying in Germany as the clean-hands-principle, if at all applicable, is generally viewed as being applicable only reciprocally.

Having concluded that the USA’s conduct was contrary to international law also means that Germany would be justified in adopting counter-measures beyond expelling the CIA-Chief in Berlin. This is confirmed by Articles 22, 42, 49 and 51 of the *International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts*, which are generally viewed as reflective of customary international law. This is further supported by discussions within the US Administration, which is confronted with similar problems to Germany’s, on whether to impose sanctions on China: US officials are reported to believe that Chinese “espionage on an unprecedented scale – the theft of the 22 million security dossiers from the Office of Personnel Management, for example- cannot go unanswered.”<sup>137</sup>

<sup>132</sup> International Law Commission, Second report on State responsibility by Mr James Crawford, Special Rapporteur, ILCOR, 51<sup>st</sup> Sess, A/CN.4/498/Add.2, (1999) at para 330-34; James Crawford, *Brownlie’s Principles of Public International Law*, 8<sup>th</sup> ed (Oxford: Oxford University Press, 2012) at 701.

<sup>133</sup> Quincy Wright, *supra* note 38 at 21; Schmalenbach, *supra* note 45 at 30-34.

<sup>134</sup> “Vom Kanzleramt beauftragt: BND spionierte bei Verbündeten” *Spiegel Online* (6 June 2015), online: Spiegel.de <<http://www.spiegel.de/politik/deutschland/kanzleramt-beauftragte-bnd-mit-spionage-bei-verbuendeten-a-1037389.html>>. The article points out that western allies have for some time not been legitimate targets of German espionage. See also Klaus Wiegrefe, “Blick nach Westen” *Spiegel Online* (6 June 2015), online: Spiegel.de <<http://www.spiegel.de/spiegel/print/d-135322469.html>>.

<sup>135</sup> Angela Merkel, German Chancellor; as quoted in (among many others) “Merkel zur Handy-Affäre: ‘Ausspähen unter Freunden- das geht gar nicht’” *Spiegel Online* (24 October 2013), online: Spiegel.de <<http://www.spiegel.de/politik/deutschland/handy-spaehaffaere-um-merkel-regierung-ueberprueft-alle-nsa-erklaerungen-a-929843.html>>.

<sup>136</sup> “Dem Bundesnachrichtendienst droht eine Revolution” *Süddeutsche Zeitung* (6 October 2015), online: SZ.de <<http://www.sueddeutsche.de/politik/bundesnachrichtendienst-unter-freunden-1.2679411>>.

<sup>137</sup> David Sanger, “Cyberthreats”, *supra* note 34. For past US reaction, also see “Christopher calls Russian espionage ‘unacceptable’”, *supra* note 49. Following unspecified allegations of Russian espionage directed against the USA, the chairman of the *Senate Intelligence Committee* suggested the “United States should consider withholding financial aid” to Russia in response.

It is therefore incorrect to conclude, as others have done,<sup>138</sup> that Germany would not be justified in imposing sanctions on the USA as far as cyber-espionage or other spying activities from within the USA are concerned, let alone in response to the other, undoubtedly unlawful spying activities outlined earlier.

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This article has argued that the alleged US spying activities in and against Germany, if proven, were unlawful under public international law.

The article set out by explaining the main espionage allegations levelled at the USA. These were then grouped into three categories, based on their different relationship to concepts such as territory or sovereignty, which made it likely that diverging international legal rules might be applicable.

Following on from that, the state of the debate as to the legality of espionage in international law was presented. It was then argued that none of these provided a satisfactory line of reasoning. This, it was argued, is due to the fact that there is no generally agreed definition of espionage and that, finally, there is also no reason to examine the legality of espionage as such, as most of the activities associated with espionage were already dealt with by widely accepted, more general rules in international law. It is therefore neither surprising nor helpful to claim that States have so far not arrived at a universally agreed conclusion on espionage's legality. In fact, the discussion surrounding the legality of espionage serves to obscure the real legal issues involved when espionage activities do occur.

The article then turned to the question of whether the main spying activities the USA is accused of as far as Germany is concerned are contrary to international law. It was concluded that that was indeed the case. There can be no doubt that employing active spies on German territory violated Germany's sovereignty as did the monitoring of German government communications from within Germany (such as from within the US Embassy in Berlin). The latter conduct was shown to also violate the *Vienna Convention on Diplomatic Relations* and the *Vienna Convention on Consular Relations* and, as far as military bases are concerned, the *NATO Status of Forces Agreement*. Even the most controversial aspect of US spying, namely the collection of confidential or secret German government communications from within the USA, was found to violate international law. It was argued that such conduct violated the prohibition on interventions in another State's internal affairs by robbing the German government of its right to decide which information it shares with other States in pursuit of its foreign, trade, and domestic policy goals. Furthermore, the motive for collecting the information, which was most likely to thwart German foreign policy initiatives contrary to US interests, was seen as another reason for

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<sup>138</sup> See, for example Talmon, *Sachverständigenutachten*, *supra* note 25 at 18. See also Gusy, *supra* note 43 at 196-97.

viewing such activities as illegal. Lastly, the fact that the USA gained a much stronger bargaining position by being aware of Germany's negotiating stance prior to the conclusion of major agreements, such as *TTIP*, was shown to violate the principle of sovereign equality.

Having explained why the clean-hands-principle, if at all applicable, would not hinder a German claim of illegality as far as US conduct is concerned, it was then concluded that Germany would be justified in adopting counter-measures against the USA.

On a more general level the article has argued that the discussion on the legality or illegality of espionage in public international law is superfluous. Rather, it was shown to be unavoidable to examine each individual act of espionage on its own merits. Given the many, often contradicting, definitions of espionage, that is the only way to ensure that like cases are treated alike. There is little ground for optimism as far as further progress in the creation of explicit rules governing espionage activities in international law are concerned. It is indisputable that States have and will always engage in espionage in the hope of gaining that seemingly vital but elusive piece of information. States will therefore prefer acting in a claimed state of legal ambiguity instead of being confronted with rules governing their conduct.

The only, albeit remote, chance of a "law on espionage" developing into a clear set of rules is based on the USA's threat perception. The more the USA feels vulnerable to cyber or other kinds of espionage, undertaken by Russia, China, or, possibly, Iran, the more likely it becomes that the USA will initiate a discussion on creating legally binding limits on espionage activities. There is already some evidence of this as far as economic espionage is concerned, with some US academics calling for legal limits to such activities. It may also just be possible that the public backlash sparked by the Snowden revelations may lead some US strategists to rethink the extent of US spying: does the value of the information gained really outweigh the costs incurred by the anti-American feelings generated by such all-encompassing espionage activities? Time will tell.

For espionage's many enthusiastic supporters within the international legal community, I would like to add that mankind's troubled history strongly implies that the "world's second oldest profession" has failed spectacularly as far as helping to avoid conflict is concerned. Rather, it would seem that espionage, probably due to its necessarily clandestine nature, has often provided incomplete or misleading results or results that could easily be manipulated by politicians. The probability therefore is that espionage has more often than not provided the grounds for armed conflict rather than for the preservation of peace.