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*Legal grounds for holding another nation's agents not personally liable for their directed violation of a nation's laws.*

### IMPUNITY OF AGENTS IN INTERNATIONAL LAW

International rules and institutions have existed since the earliest days, but it was not until the 16th and 17th centuries that there were developed the laws governing relations between European states which became the basis of our present-day international law. The disintegration of the Holy Roman Empire and the emergence of sovereign states representing great concentrations of military, economic, and political power led to the development or formulation of new rules by which nations sought to govern their dealings with one another. At the same time the concept of sovereignty as a power constituting the sole source of laws was enunciated, and with it an explanation of the concept of the nation.

The rules of international law and the concept of sovereignty in a sense limit each other; and particularly in the treatment of crimes like espionage and subversion, international law is confronted with what Philip C. Jessup once called the "taboo of absolute sovereignty." The state is especially jealous of its power to punish those who it believes have tried to undermine its authority, and the principles of international law can apply in matters affecting the security of a state only at the discretion of that state. The Swiss diplomat Emerich de Vattel, whose book *Le Droit des Gens*<sup>1</sup> had an influence on American political philosophy, was one of the early writers in international law who observed that men "put up with certain things although in themselves unjust and worthy of condemnation, because they cannot oppose them by force without transgressing the liberty of individual Nations and thus destroying the foundations of their natural society." Vattel was particularly concerned with the relationships, duties, and responsibilities of nations during times of stress.

<sup>1</sup> *Law of Nations*. Fenwick, Trans. (Washington: Carnegie Institution of Washington, 1916.)

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### *Principles of National Jurisdiction*

The concept of sovereignty carries along with it the rule that the laws of a country are supreme within its own territorial limits. Consequently, generally speaking, whether a particular act constitutes a crime is determined by the laws of the country within whose borders it was committed. In extension of this *territorial* principle for determining national jurisdiction, however, there have been developed, in accordance with the varying experience of individual nations, at least four other pragmatic principles which a state may choose to follow in determining whether it can try a person criminally for acts committed in violation of its laws. A *nationality* principle would determine jurisdiction by reference to the nationality or national character of the person committing the offense, so that his own state would try him under its law. Under a *protection* principle, jurisdiction would go to the state whose national interest was injured by the offense, wherever it was committed. A *passive personality* principle would similarly determine jurisdiction by reference to the nationality or national character of the *person* injured. And a *universality* principle, finally, would give it to the state having custody of the offender.<sup>2</sup> In any case, however, a state may claim jurisdiction only with respect to an act or omission which is made an offense by its own laws.

The principle of *territorial* competence is basic in Anglo-American jurisprudence, and it has been incorporated in many other modern state codes. Its basis is the sovereign, which has the strongest interest, the best facilities, and the most powerful instruments for repressing crimes in its territory, by whomever committed. It is obvious that under the territorial principle the sovereign must exercise exclusive control over the acts of persons within its territory; there is no question of its right of jurisdiction to punish acts that constitute a threat to its authority.

The concept of sovereignty is so strong, however, that it may also, in the *protective* principle of jurisdiction, push beyond state borders with power to try persons outside engaging in acts against the security, territorial integrity, or po-

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<sup>2</sup> Research in International Law Supplement to the *American Journal of International Law*, Vol. 29 (1935).

litical independence of the state. This principle was formulated in statutes of the Italian city-states in the 15th and 16th centuries, and many modern states apply it to both aliens and citizens. Conflicts arise, of course, where the prohibited acts are carried on in another state in which such acts are not illegal. Without agreement, it is difficult to see how the protective theory can be effective in such cases without an infringement of the sovereignty of the second state.

In the United States, the rule seems to be that the protective principle is not applied unless the legislation designating the crimes so specifies. In the Soviet Union, espionage cases apparently do fall under the protective theory of jurisdiction. In the October 1960 *International Affairs*, G. Zhukov wrote:

It should be noted that American plans of space espionage directed against the security of the USSR and other Socialist countries are incompatible with the generally recognized principles and rules of international law, designed to protect the security of states against encroachments from outside, including outer space.

This position would give the USSR (and other Bloc countries) jurisdiction over espionage offenses against them, no matter where perpetrated.

#### *Scope of Immunities*

On the other hand, the USSR has, in effect, recognized the immunity of American military attachés within its territory by not prosecuting the charges of espionage leveled against them. It thus honors the provisions of international law and agreement whereby officers, diplomatic representatives, consuls, armed forces, ships, aircraft, and other persons and instrumentalities of a state may be immune from the exercise of another state's jurisdiction even under the territorial principle and consequently not subject to legal penalties.<sup>3</sup>

While diplomatic immunity as applied to embassy officials is universally accepted, the question of what persons outside

<sup>3</sup> "Diplomatic Immunity from Local Jurisdiction: Its Historical Development Under International Law and Application in United States Practice," by William Barnes. Department of State Bulletin, 1 August 1960.

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this category can claim a similar immunity becomes more difficult. There is nevertheless some authority in international law for the proposition that if a man is a duly commissioned agent of his government, albeit without diplomatic immunity, any illegal acts he performs within the scope of his duties may still be considered not his personal violations but his government's national acts, raising questions public and political between independent nations. Under this theory the offended nation ought not try the individual before ordinary tribunals under its own laws but should seek redress according to the law of nations.<sup>4</sup>

This theory and variations of it have found acceptance in a number of situations. For example, in the Claims Convention between France and Mexico of 25 September 1924, Mexico assumed liability for certain acts of its revolutionary forces, accepting the even broader principle that the "responsibility of the State exists whether its organs acted in conformance with or contrary to law or to the order of a superior authority."<sup>5</sup> The applicability of the theory in any particular case depends, of course, not only on its being accepted by the offended nation but also on an acknowledgment by the offending nation that the offender is in fact its commissioned agent, that it authorized or now adopts his acts as its public acts. For this reason texts on international law have denied its application to the acts of secret political agents and spies:

... An agent ... secretly sent abroad for political purposes without a letter of recommendation, and therefore without being formally admitted by the Government of the State in which he is fulfilling his task ... has no recognized position whatever according to International Law. He is not an agent of a State for its relations with other States, and he is therefore in the same position as any other foreign individual living within the boundaries of a State. He may be expelled at any moment if he becomes troublesome, and he may be criminally punished if he commits a political or ordinary crime. ...

Spies are secret agents of a State sent abroad for the purpose of obtaining clandestinely information in regard to military or political secrets. Although all States constantly or occasionally send spies

<sup>4</sup> Secretary of State Webster to Attorney General Crittenden, 15 March 1841. See 2 Moore International Law Digest 26 (1906).

<sup>5</sup> Hackworth 557 (1943).

abroad, and although it is not considered wrong morally, politically, or legally to do so, such agents have, of course, no recognized position whatever according to International Law, since they are not agents of States for their international relations. Every State punishes them severely when they are caught committing an act which is a crime by the law of the land, or expels them if they cannot be punished. A spy cannot legally excuse himself by pleading that he only executed the orders of his Government, and the latter will never interfere, since it cannot officially confess to having commissioned a spy.<sup>6</sup>

Nevertheless governments do sometimes officially confess to having commissioned their clandestine agents and do interfere in their prosecution under the law of the offended land. Although the several historical cases on record have not afforded a fully adequate test of this ground for claiming personal impunity they do include some in which the offended nation has accepted it. In three cases the United States has been involved.

#### *Paramilitary Raid*

During the 1837 insurrection in Canada the rebels obtained recruits and supplies from the United States. A small steamer, the *Caroline*, was used for this purpose by a group encamped on the American side of the Niagara River. On 29 December 1837, while moored at Schlosser, on the American side, with 33 American citizens on board, this steamer was boarded by an armed body of men from the Canadian side under the orders of a British officer. They attacked the occupants, wounding several and killing at least one American, and then fired the steamer and set her adrift over Niagara Falls. The United States protested. The British Government replied that the piratical character of the *Caroline* was established, that American laws were not being enforced along the border, and that destruction of the steamer was an act of necessary self-defense.

In November 1840 British citizen Alexander McLeod was arrested by New York State authorities on a charge of mur-

<sup>6</sup>H. Lauterpacht, *Oppenheim's International Law* (Longman's, 7th ed., 1948), Vol. I, pp. 770, 772.

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der in connection with the Caroline affair. On 13 December 1840 Mr. Fox, the British Minister at Washington, asked on his own responsibility for McLeod's immediate release, on the ground that the destruction of the *Caroline* was a "public act of persons in Her Majesty's service, obeying the order of their superior authorities," which could, therefore, "only be made the subject of discussion between the two national Governments" and could "not justly be made the ground of legal proceedings in the United States against the persons concerned." On 28 December 1840 the U.S. Secretary of State, Mr. Forsythe, replied that no warrant for interposition in the New York State case could be found in the powers with which the Federal Executive was invested, and he also denied that the British demand was well founded.

When on 12 March 1841, however, Mr. Fox presented the British Government's official and formal demand for McLeod's release on the same grounds, Daniel Webster, who had meanwhile become Secretary of State, wrote to the Attorney General communicating the President's instructions and laying down the following principle:

That an individual forming part of a public force, and acting under the authority of his Government, is not to be held answerable, as a private trespasser or malefactor, is a principle of public law sanctioned by the usages of all civilized nations, and which the Government of the United States has no inclination to dispute.

Webster answered the British on 24 April, admitting the grounds of the demand, but stating that the Federal Government was unable to comply with it. He apparently believed, however, that the British action would give New York State cause to exempt McLeod from prosecution. McLeod brought a habeas corpus proceeding, but his discharge was refused by the New York court. He was brought to trial on the murder charge and acquitted. In a final note to Lord Ashburton disposing of the Caroline matter, Mr. Webster wrote:

This Government has admitted, that for an act committed by the command of his Sovereign, *jure belli*, an individual cannot be responsible in the ordinary Courts of another State. It would regard it as a high indignity if a citizen of its own, acting under its

authority and by its special command in such cases, were held to answer in a municipal tribunal, and to undergo punishment, as if the behest of his government were no defense or protection to him.<sup>7</sup>

*Confidential Factfinder, No Spy*

On 18 June 1849 Secretary of State Clayton issued to Mr. A. Dudley Mann, who was then in Europe, instructions for a mission it was desired he undertake as a special and confidential agent "to obtain minute and reliable information in regard to Hungary," then in revolt against the Austrian Imperial Government. Mr. Mann proceeded to Vienna, where he found the revolution practically quelled, and therefore did not visit Hungary. The text of his instructions, however, was made public in 1850 when President Taylor released it to the U.S. Senate in response to a Senate resolution. The Austrian chargé d'affaires in Washington, Mr. Hulsemann, then entered an official protest, declaring:

Those who did not hesitate to assume the responsibility of sending Mr. Dudley Mann on such an errand, should, independent of considerations of propriety, have borne in mind that they were exposing their emissary to be treated as a spy. It is to be regretted that the American Government was not better informed as to the actual resources of Austria and her historical perseverance in defending her just rights . . . the Imperial Government totally disapproves, and will always continue to disapprove, of those proceedings, so offensive to the laws of propriety; and that it protests against all interference in the internal affairs of its Government.

Mr. Webster, by now again Secretary, replied:

. . . the American Government sought for nothing but the truth; it desired to learn the facts through a reliable channel. It so happened, in the chances and vicissitudes of human affairs, that the result was adverse to the Hungarian revolution. The American agent, as was stated in his instructions to be not unlikely, found the

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<sup>7</sup>The texts of the early diplomatic communications regarding the Caroline affair and the McLeod case can be found in the report on *People v. McLeod*, 25 Wend 482 (N.Y. 1841). Others can be found in British and Foreign State Papers 1841-1842, volume 30. 2 Moore 24 (1906) contains a complete summary of the affair. So does "The Caroline and McLeod Cases" by P. Y. Jennings, appearing in 32 Am. Jr. Int. Law 82 (1938). The latter also contains information on the aftermath of the case in which McLeod sought reimbursement from a Claims Commission. A learned critique by Judge Talmadge of the decision in *People v. McLeod* is found in 26 Wend Appendix 663 (N.Y. 1842). Textbooks such as BISHOP p. 584 (1953) and 1 HYDE 239 (2d Edition 1931) give summaries of the affair.

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condition of Hungarian affairs less prosperous than it had been, or had been believed to be. He did not enter Hungary nor hold any direct communication with her revolutionary leaders. He reported against the recognition of her independence because he found she had been unable to set up a firm and stable government. He carefully forebore, as his instructions require, to give publicity to his mission, and the undersigned supposes that the Austrian Government first learned its existence from the communications of the President to the Senate.

Mr. Hulsemann will observe from this statement that Mr. Mann's mission was wholly unobjectionable, and strictly within the rule of the law of nations, and the duty of the United States as a neutral power. He will accordingly feel how little foundation there is for his remark that "those who did not hesitate to assume the responsibility of sending Mr. Dudley Mann on such an errand, should, independent of considerations of propriety, have borne in mind that they were exposing their emissary to be treated as a spy." A spy is a person sent by one belligerent to gain secret information of the forces and defenses of the other, to be used for hostile purposes. According to practice, he may use deception, under the penalty of being lawfully hanged if detected. To give this odious name and character to a confidential agent of a neutral power, bearing the commission of his country, and sent for a purpose fully warranted by the law of nations, is not only to abuse language, but also to confound all just ideas, and to announce the wildest and most extravagant notions, such as certainly were not to have been expected in a grave diplomatic paper; and the President directs the undersigned to say to Mr. Hulsemann that the American Government would regard such an imputation upon it by the cabinet of Austria, as that it employs spies, and that in a quarrel none of its own, as distinctly offensive, if it did not presume, as it is willing to presume, that the word used in the original German was not of equivalent meaning with "spy" in the English language, or that in some other way the employment of such an opprobrious term may be explained. Had the Imperial Government of Austria subjected Mr. Mann to the treatment of a spy, it would have placed itself without the pale of civilization, and the cabinet of Vienna may be assured that if it had carried, or attempted to carry, any such lawless purpose into effect in the case of an authorized agent of this Government the spirit of the people of this country would have demanded immediate hostilities to be waged by the utmost exertion of the power of the Republic—military and naval.\*

### *German Saboteur*

Werner Horn, a German, was indicted in the Federal District of Massachusetts for unlawfully transporting explosives early in World War I from New York to Vanceboro, Maine.

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\* 1 Moore 218 (1906)



Horn claimed immunity from trial upon the indictment in a petition for habeas corpus. His contention, which the Circuit Court of Appeals for the First Circuit called "without precedent," was as follows:

That your petitioner is an officer in the army of the empire of Germany, to wit, a first lieutenant in the division of the aforesaid army known as the Landwehr; that a state of war exists between the empires of Great Britain and Germany, which state of war has been recognized by the President of the United States in an official proclamation; that your petitioner is accused of destroying part of the international bridge in the township of McAdam, province of New Brunswick and Dominion of Canada; that he is now held in custody by the respondent on the charge of carrying explosives illegally, which allegation, if true, is inseparably connected with the destruction of said bridge; that he is a subject and citizen of the empire of Germany and domiciled therein, and is being held in custody for the aforesaid act, which was done under his right, title, authority, privilege, protection, and exemption claimed under his commission as said officer as described aforesaid.

Claiming thus that the felony for which he was indicted was incidental to an act of war cognizable only by the law of nations, Horn quoted Webster's statement in the Caroline affair: "That an individual forming part of a public force, and acting under the authority of his government, is not to be held answerable as a private trespasser or malefactor, is a principle of public law sanctioned by the usages of all civilized nations, and which the Government of the United States has no inclination to dispute." The Circuit Court did not dispute the principle, but, noting that "this exemption of the individual is on the ground that his act was a national act of his sovereign," held that the petition failed "entirely to show either express or implied national authority for doing the acts charged in the indictment; therefore no question of international law is involved, and the District Court has full jurisdiction to proceed to trial of the indictment found by its grand jury."<sup>o</sup>

*European Cases*

In 1887 the German Government arrested and put on trial one Schnaebeler, a French customs inspector who had operated

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<sup>o</sup> Horn v. Mitchell, 232 F. 819 (1st Cir., 1916). Affirmed on other grounds 243 US 247 (1917).

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a network of secret agents in Germany. The arrest was made during an official visit he paid to Germany to hold a customs conference. In the course of his interrogation he admitted that he had been inciting German nationals to treason. The French Government intervened on the grounds that Schnaebele enjoyed extraterritorial protection during his visit to Germany. These grounds, which obviated any need for French acknowledgment of his commission as a subversive agent, were apparently considered sufficient: Bismarck ordered Schnaebele released.<sup>10</sup>

In the 1920's the Italian secret service, using Italian agents in Switzerland, lured one Cesare Rossi from his Swiss hotel room to the Italian enclave at Campione, where he was arrested and taken to Italy. The Swiss Government protested these "acts attributable to the authorities of another state" which "not only violate national dignity but which also cause a state of unrest and suspicion . . ." It is not known whether the Italian authorities acknowledged such an attribution of their agents' acts in the diplomatic talks which followed, but the affair was settled in de facto accordance with the principle of agent impunity: on 21 November 1928 the Swiss Government announced that it considered the matter closed, since the Italian official involved in illegal intelligence activities had left Switzerland and two Italian nationals who had illegally relayed information had been deported.<sup>11</sup>

In Sweden there is apparently a trend toward the rule that if an apprehended agent is acknowledged by his government to have been acting under orders he cannot be brought to trial in the apprehending country; his illegal acts become a matter for diplomatic discussion between the two governments. A case since World War II on which details are not available was disposed of in this way by a Swedish court.<sup>12</sup>

### *War and "Imperfect" War*

None of these cases offers a precise precedent for one in which a peacetime espionage agent is apprehended by the target country and then released to his government upon its

<sup>10</sup> Johannes Erasmus, *The Intelligence Service* (Institute of International Law, Goettingen University, 1952), p. 55.

<sup>11</sup> *Ibid.*, p. 54.

<sup>12</sup> Believed to be documented in Rytt Juidiskt Arkiv No. 15, 1946.

acknowledgment of his commission. In those that are otherwise quite close, war is an element in the circumstances, with the offended nation often a third party. Webster's final note on the Caroline affair specifically cited *ius belli*. The blamelessness of the mere instruments of a government waging however unjust a war is well recognized. Vattel wrote:

But as to the reparation of any damage—are the military, the general officers and soldiers, obliged, in consequence, to repair the injuries they have done, not of their own will, but as instruments in the hands of their sovereign? It is the duty of subjects to suppose the orders of their sovereign just and wise . . . When, therefore, they have lent their assistance in a war which is afterwards found to be unjust, the sovereign alone is guilty. He alone is bound to repair the injuries. The subjects, and in particular the military, are innocent; they have acted only from a necessary obedience.<sup>13</sup>

Yet there appears to be a similarity between the wartime situation in which a uniformed member of a force gathering information behind enemy lines, when captured, is treated as a prisoner of war rather than executed for spying and the peacetime situation of an intelligence agent whose acts are acknowledged and adopted by the sending state. In both the agent is a mere instrument of the state. The basis for the traditional practice of holding the agent personally responsible seems to be the clandestine nature of his acts. When these are adopted by the sending state they are no longer clandestine, and the ultimate responsibility is fixed.

As for *ius belli*, texts on international law recognize that no clean-cut distinction can be made between war and peace in this respect. A contemporary authority cites some of the older texts for the proposition that:

If a country feels that it is being threatened by the unlawful conduct of another country—such as perhaps by preparations for aggression—that country should be free to protect itself against such a threat with the help of defensive measures. This includes the employment of agents for the purpose of determining enemy intentions.<sup>14</sup>

<sup>13</sup> 3 Vattel, Section 187.

<sup>14</sup> Erasmus, *op. cit.*, p. 115, footnote 120, citing Heffter-Geffeken (p. 495), Venselow (p. 227), Vattel (pp. 598 and 607), and Rogge, *Nationale Friedens-Politik* (p. 596).

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The older texts point out various types of hostile acts short of formal war that a sovereign might commission his subjects to perform.<sup>15</sup> Judge Rutherford says:

If one nation seizes the goods of another nation by force, upon account of some damage, etc., such contentions by force are reprisals. There may be likewise other acts of hostility between two nations which do not properly come under the name of reprisals, such as the besieging of each other's towns, or the sinking of each other's fleets, whilst the nations in other respects are at peace with each other. These are public wars, because nations are the contending parties. But as they are confined to some particular object, they are of the imperfect sort . . .<sup>16</sup>

Vattel commented that:

A war lawful and in form, is carefully to be distinguished from an unlawful war entered on without any form, or rather from those incursions which are committed either without lawful authority or apparent cause, as likewise without formalities, and only for havoc and pillage.<sup>17</sup>

He indicated that all hostile acts were lawful wars, if made with lawful authority and apparent cause, and "not for pillage and havoc." This rule had its application in admiralty cases. Justice Story stated:

Every hostile attack of a piratical nature in times of peace, is not necessarily piratical. It may be by mistake, or in necessary self-defense, or to repel a supposed meditated attack by pirates—it may be justifiable, and then no blame attaches to the act; or, it may be without just excuse, and then it carries responsibility in damages. If it proceed further; if it be an attack from revenge and malignity, from gross abuse of power and settled purpose of mischief, it then assumes the character of a private unauthorized war, and may be punished by all the penalties which the law of nations can properly administer.<sup>18</sup>

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<sup>15</sup> Judge Talmadge discusses this point in his learned critique of the decision in *People v. McLeod*, cited in footnote 7 above.

<sup>16</sup> 2 Rutherford, Section 10, as cited in 26 Wend Appendix 663 (NY 1842).

<sup>17</sup> 3 Vattel, Section 67.

<sup>18</sup> *The Marianna Flora. The Vice-Consul of Portugal, Claimant.* 24 US (11 Wheat. 1, 41) 1 (1826); 6 L. Ed. 405, 414.

These texts, therefore, in enunciating the principle of personal impunity, are not speaking of war only in terms of formal declared war, but including also hostile acts when otherwise peaceful conditions exist. As Rutherford points out:

In the less solemn kinds of war, what the members do who act under the particular direction and authority of their nation, is by the law of nations no personal crime in them; they cannot, therefore, be punished consistently with the law, for any act in which it considers them only as the instruments, and the nation as the agent.<sup>19</sup>

A principle of international law which emerges from a study of the older texts might then be stated as follows. *Where an individual, under orders from his sovereign, commits a hostile act upon a foreign nation, this cannot be said to be a controversy between individuals, to be decided by a court under domestic law where there is a common judge and arbiter. This is a controversy between nations, who admit no judge except themselves.* While this rule arose during periods of historical development when concepts of hostilities and relations between nations were much more rudimentary than at present, the basic problems of the rights and responsibilities of nations were similar to what they are now. This principle has been recognized by the United States since the early days of the Republic. The third Attorney General of the United States, writing to the Secretary of State on 29 December 1797, declared:

It is well settled in the United States as in Great Britain, that a person acting under a commission from the sovereign of a foreign nation is not amenable for what he does in pursuance of his commission to any judiciary tribunal of the United States.<sup>20</sup>

#### *Broader Considerations*

We have not attempted in this discussion to take into account the broader implications of general international acceptance of a rule of law that the state is responsible for all the acts of a subject carried out pursuant to orders of the sovereign. It can easily be seen that a nation might demand

<sup>19</sup> 2 Rutherford, Section 18, as cited in 26 Wend Appendix 663 (NY 1842).

<sup>20</sup> Quoted in 26 Wend Appendix 663 (NY 1842).

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limitations placed on the rule, and in many cases a nation might totally reject the rule for its purposes. Questions such as the following would have to be pondered by all nations. Could a murder committed pursuant to orders by an agent of a foreign nation be permitted to go unpunished if the foreign nation demanded his return? What would be the implications for a small nation if a strong nation flooded the country with illegal espionage agents acting under orders, and upon capture made a request for their return? Would war or the threat of war as an alternative to punishment act as a deterrent on the use of authorized confidential agents collecting information from foreign countries?

Some of these questions have been raised in the past and have moved many writers not to recognize the right of a sovereign to expect the return of an agent who pursuant to orders has committed an offense against another sovereign. We have not attempted to present here the opposing viewpoint of these writers or to discuss the limitations on the rule of personal impunity as it appears in international law. The purpose of this paper has been simply to explore the precedents and authorities in international law to determine if there is any basis for the proposition that a government has the right to the return of one of its officers who has been apprehended abroad for criminal acts committed pursuant to its orders. There is such a basis.