

Espionage and Its Relation to Diplomats and Intelligence Officers

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ABSTRACT

Espionage² is certainly a topical area or activity, which we can claim to be present in many, if not in all areas of social activity. In this article, we will primarily be concerned with the presence of espionage as an illegal act in diplomacy. We will extend our analysis of espionage also to the field of intelligence services, as we have determined that the activities are complementary, intertwining and cooperative. We will focus on the function/ task of obtaining data and information³.

We are interested to research the relationship between diplomacy and the intelligence service of a particular country, the need and causes of spying and last but not least, the consequences of possible detection of spying.

Both diplomacy and intelligence services are primarily established for the purpose of operations in and in relation to foreign countries, that is, in the international community. It is absolutely clear that a country as a sovereign entity in the modern world has no viability if it does not connect and does not cooperate with other countries. Integration and cooperation depends essentially on the interests of each country in the international community, which in most cases is an economic interest.

To be able to regulate international conditions and relations with other countries, they need data and information to provide them the knowledge about how to successfully regulate and implement their interests in the international community.

KEY WORDS: diplomat, diplomacy, intelligence services, spy, espionage

POVZETEK

Vedno aktualno področje oz. dejanje je prav gotovo vohunjenje, za katerega lahko rečemo, da je prisotno na mnogih, če ne na vseh področjih družbenega delovanja. V tem članku nas bo primarno zanimala prisotnost vohunjenja, kot nezakonitega delovanja v diplomaciji. Obravnavo vohunjenja razširimo tudi na področje delovanja obveščevalnih služb, saj ugotavljamo, da se dejavnosti dopolnjujeta, prepletata in sodelujeta. Osredotočili se bomo na funkcijo/nalogo pridobivanja podatkov in informacij.

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2 Illegal act of obtaining secret or confidential information in an unlawful manner and by unauthorized means

3 The article deals with the government institutions, not with individual intelligence services.

Zanimajo nas odnos med diplomacijo in obveščevalno službo določene države, potreba in vzroki za vohunjenje in ne nazadnje posledice morebitnega odkritja vohunjenja.

Tako diplomacija kot obveščevalne službe so primarno namenjene delovanju v tujini in v povezavi s tujino, torej v mednarodni skupnosti. Popolnoma jasno je, da država kot suverena entiteta v sodobnem svetu nima možnosti preživetja, če se ne povezuje in ne sodeluje z ostalimi državami. Povezovanje in sodelovanje je bistveno odvisno od interesa posamezne države v mednarodni skupnosti, ki je v večini primerov ekonomski interes.

Za urejanje mednarodnih razmer in odnosov z drugimi državami, le-te potrebujejo podatke in informacije, ki rezultirajo v znanju, da lahko uspešno urejajo in uveljavljajo svoje interese v mednarodni skupnosti.

KLJUČNE BESEDE: diplomat, diplomacija, obveščevalne službe, vohun, vohunjenje

INTRODUCTION

To a common reader, the world of diplomacy, intelligence services and spying represents a world of secrecy where the secrets are carefully protected. The non-professional public usually perceives and understands diplomacy as an activity without any specific effects, a ceremonial or prestige operating in “white gloves”. Intelligence service is associated with action, a lot of tension and intrigue, for which the film industry is most responsible. Spying is perceived as the act of obtaining protected secrets and has a negative connotation.

Most countries have their diplomatic missions in various countries around the world established through the Ministries of Foreign Affairs, depending on their interests and needs. The activity is internationally recognized and codified. The intelligence services are also part of the state establishment and they are intended to operate in and in relation to foreign countries. In the field of operation of the intelligence services a legislation gap can be identified in international law, so the consensus on their operation in the international community has not been achieved yet. Often, the intelligence services are labelled as “espionage services”, which we believe is incorrect, despite certain deviations identified within the intelligence services operations. In this context the term “espionage services” is understood as a means to draw attention.

It is diplomacy and intelligence service that make a great contribution to solving, regulating complex and demanding international relations or interests and avoiding the use of force. The article deals with both activities; primarily we are interested in the need for espionage and its presence in diplomacy and intelligence services.

For a better understanding, we will first consider and present the basic concepts and the essential differences of the activities that are discussed in this article. Then we will continue with a historical overview of the development of diplomacy and intelligence services, and finally, we will consider the topic from the legal point of view.

TERMS AND DEFINITIONS

The term “**diplomacy**” is often used, especially in the Anglo-Saxon area, as a synonym for “negotiations”. The term should not be equated

with negotiations, although the essence of diplomacy as a specific activity is the regulation of international affairs by means of negotiation. The synonymous use of the terms is understandable, but not precise (Petrič, 2010, p. 34). Diplomacy is the established method of influencing decisions and behaviours of foreign governments and people through dialogue, negotiations and other measures (Freeman, Marks, 2016). Diplomacy is the established method used by ambassadors and envoys to regulate and manage relationships (Satow cited in Jazbec, 2009, p. 19). We can describe it as a means by which the state communicates with the external world (Watson cited in Justinek, 2011, p. 26). It should be understood as a performer of foreign policy orientations and decisions, with “the ability to make tactical decisions, i.e. decisions on how to achieve the goals of foreign policy, but it does not define the goals and strategy of foreign policy” (Petrič, 2010, p. 34). From these definitions the function of obtaining data and information is not directly evident.

Intelligence is the widest concept of all the concepts used in connection with information (e.g. intelligence system, espionage, intelligence community, etc.) and it can be defined as “the result of obtaining, analysis, aggregation and interpretation of all available data concerning one or several aspects of a foreign country or operational area that is directly or potentially important for planning” (Richelson cited in Purg, 2002, p. 14) and “refers to information that the government recognizes as important for its military, foreign and security interests» (Britovsek, 2008, p. 2).

The primary function of intelligence activity is to acquire important data and to hand them over to the responsible persons who use them as an aid in the process of political decision-making, but it should be emphasized that the intelligence services do not decide on political issues, they only express their position (Milašinović, 1983, pp. 72-73). In the wider sense, intelligence can be defined as an organized acquisition of new knowledge, various information on events, phenomena, nature, society, that is, about everything that is happening around us (Podbregar, 2008, p. 23). In the narrower sense, the activity includes only the secret collection and analysis of data and their transformation into so-called intelligence information (Purg, 2002, p. 15).

The work of intelligence services today is not based on secretly obtained information, but in addition to the “special methods and means

of work”, other “legal” options for obtaining data are also used. Nevertheless, they sometimes perform “dirty work” with the aim of influencing the political moves of a particular state by pressure (Purg, 1995, p. 33).

Djordjević (cited in Podbregar, 2008, p. 25) says that intelligence activity acquires the secrets of an opponent and is called the intelligence service and that it is a means of achieving domination over the opponent in a political battle. In addition to its competencies, it also performs functions of political nature, especially in the areas where and when legal political means are insufficient or inadequate (Milašinović, 1984, p. 11).

It is difficult to make a precise **definition of espionage** throughout history. It can be understood both as secret operation which is not illegal, and secret operation which is illegal. For this reason, the question of the exact definition of “espionage” arises. Who is a spy? How can we precisely define espionage?

Lukić (1982, p. 7) considers it to be difficult to give the concept of espionage a complex and precise definition. Undoubtedly, the most incorrect definition of the concept of espionage is the one which replaces the essence of espionage with the form and means by which secret information is obtained by illegal means. Such definition of the concept of espionage is more correct in terms of its technical than its contentual meaning and it is also too simplified because it does not take into account the “soul” or the essence which determines its social character which espionage holds in relation to each country.

Espionage “is the obtaining confidential information on other countries by secret and illegal means and methods for achieving the policy and objectives of the state that organizes such an activity in order to protect the security of its own country and causing damage to the interests, politics and security of other countries” (Lukić, 1982, p. 8).

If, on the basis of the Regulations or Annex to The Hague Convention IV (Respecting the Laws and Customs of War on Land) signed in 1907, we try to make a definition of espionage, a person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party (Law and Customs of War (Hague IV), 1907, Article 29). The es-

espionage in the international law of armed conflicts is not prohibited, but the persons caught in espionage do not enjoy the status of a prisoner of war. They are treated in accordance with the regulations of the country which arrested them during the espionage and they cannot be punished without a previous trial (Sancin, Švarc and Ambrož, 2009, p. 145).

“Espionage means illegal obtaining of secrets, legally protected, or performing illegal activities related to intelligence activities. These are therefore unlawful activities for which the legal order of criminal law sanctions is laid down. By the intelligence activity we obtain such information and perform to that effect, illegal activities (in domestic legislation such activities of the intelligence service are legalized by a special Intelligence and Security Agency Act). Therefore, it can be said that espionage is only a part of and one of the methods of intelligence activity and that it cannot be a synonym for it in any way” (Šaponja, 1999, p. 59).

The dictionary on the website of the Slovene Intelligence and Security Agency defines the spy as “a member of the intelligence service, the police, the resistance movement or other organization engaged in secret intelligence services” (SOVA, 2018).⁴ The English Oxford Dictionary defines a spy as a person employed by a government or other organization to secretly obtain information on an enemy or competitor.⁵

The US intelligence community uses the following definition of an agent: “it is a person involved in secret intelligence activities led by an intelligence organization, but he is not an operator, employee, or assigned employee of that organization” (Carl cited in Podbregar, 2008, p. 35)

HISTORY

Modern diplomatic practices are a product of the post-renaissance period. Historically, **diplomacy** meant the conduct of official (usually bilateral) relations between sovereign states. By the 20th century, however, the diplomatic practices established in Europe had been adopted throughout the world, and diplomacy had expanded among other entities internationally (international conferences, parliamentary di-

⁴ At URL: http://www.sova.gov.si/si/povezane_vsebine/glosar/.

⁵ At URL: <https://en.oxforddictionaries.com/definition/spy>

plomacy, the international activities of supranational and subnational entities, etc.) (Freeman, Marks, 2016). Diplomacy has developed from diplomatic missions that were organized on ad hoc basis in the past and did not have resident diplomatic missions (Türk, 2007, p. 209).

The development and the establishment of international relations, which are understood as interstate relations, can be closely related to the establishment of states or “territorialized social communities” (Benko, 1987, p. 14), for which reason, in order to study the development of diplomacy, it is necessary to accept the thesis that the state is a key factor in diplomacy; consequently, the period of Ancient Greek city-states is one of the most important in the development of diplomacy (Jazbec, 2009, p. 31).

An important starting point for international relations is the interdependence between individual territorialized social communities. A specific region (country) cannot provide all material goods or conditions necessary for material production. The deficit of certain goods can be solved by provision of such goods in other territories, in two ways; firstly by co-operation and secondly by force (Benko, 1987, p.15).

At that time, the great Roman Empire did not know about equality, so they achieved their goals by the use of force. Their emissaries went to the conquered states and reported on the situation in the provinces, and the mighty Rome did not pay too much attention to other countries (Vukadinović, 1994, p. 18). Jazbec (2009, p. 32) claims that unlike Greece, Rome did not develop and upgrade diplomatic practices, the reason for which was the dominance of the Roman Empire and its occupation of the whole world known at that time.

In the 12th century, Bizanc expanded the functions of the emissaries, who were no longer just transmitting messages, but also reported on the situation in the states to which they were sent. The beginning of the so-called great chapter in the history of diplomatic activity is equated with espionage by some people who consider that every diplomat is also necessarily a “spy” (Vukadinović, 1994, p. 19).

In the Renaissance, in addition to the great social and cultural changes, the establishment of diplomacy at a different level is also important. The development of diplomacy was mainly carried out in the Republic of Venice, Milan and Tuscany. The development of Venice

into a commercial superpower and its operations around the world required a lot of information for the successful operation, which resulted in the development of diplomacy that was no longer just an occasional sending of emissaries or the reception of foreign emissaries, but a form of permanent activity with permanent envoys. The Venetian ambassadors or diplomacy were the first to use codes when sending out and receiving messages, thus effectively securing the confidentiality of the content from those who were not concerned with it (Vukadinović, 1994, p. 19-20).

The function of the Italian diplomats was to act in such a manner as to provide the best maintenance and enlargement of their state, which was later to become the fundamental characteristic of diplomacy (Barbaro cited in Vukadinović, 1994, p. 21). "A diplomat comes from the *raison d'état* and strives to remain at such a level that things can be addressed in politically realistic way, at the same time recognizing and accepting that everything that is in relations between individuals ethically and morally unacceptable, in the state matters has a different connotation" (Vukadinović, 1994, p. 21). There is no need for a diplomat to doubt in his choice between moral and immoral acts; he must ask himself only one question before making decision, namely: What will preserve the power and freedom of his homeland (Machiavelli cited in Vukadinović, 1994, p. 22)? The envoys of the Italian city-states created with their personal endeavours a real spy-network, which in addition to espionage activities was dealing also with more rough activities such as political murders, which were quite common in Italy (Milašinović, 1983, p. 20).

Especially in the 17th and 18th centuries, diplomatic officials were required to spy in addition to their usual tasks. A diplomat was called "an honest spy". They were provided with material resources for bribes to influential persons in the countries of accreditation, and the act was considered "unobtrusive" to international law. Moreover, bribery in order to obtain confidential information was understood as a duty of every diplomat (Milašinović, 1983, pp. 22-23).

At the turn of the 19th to the 20th century, Europe was practically the centre of international politics. The politics were determined by five major European countries which automatically gave themselves the right to decide on the politics of small countries. This mode of operation caused inequality and the possibility of high risks. Operation

of the so-called classical diplomacy⁶ was secret and was far from the public's eyes. With the entry of two large countries into world politics (the USA and the USSR), the methods of classical diplomacy began to collapse. The lack of confidence in the European institutions, in the diplomacy of the five European countries and the belief in the equality of all people, guided the American president Wilson to try to change the way and methods of operation of classical diplomacy. The new, so-called modern diplomacy⁷ was supposed to be more open and not to use the methods of operation of the so-called classical diplomacy (Vukadinović, 1994, pp. 37-39). The key role in the shaping of the elements of modern diplomacy can be attributed to the diplomatic effect of the League of Nations (1920), whose activity was based on the association of nations, or general rules and principles, and further on the convening annual meetings at a specific location and at a specific time with a permanent Secretariat with qualified international experts (Jazbec, 2009, p. 39). In any case, the historical experience, especially the ineffective operation of the League of Nations, played an essential role in the founding of the next international organization with a central mission: the maintenance of international peace and security - the United Nations, which was founded after the Second World War and is still considered to be the most influential international organization (Türk, 2007, pp. 321-322).

By adopting international treaties, such as the Vienna Convention on Diplomatic Relations (1961) and the Vienna Convention on Consular Relations (1963), modern diplomacy was codified.

During the Cold War⁸, activities of embassies, such as subversion or espionage, were flourishing, so diplomatic missions became centres of intelligence services. In addition to these activities, which were consistent neither with diplomatic activity nor with the Vienna Convention on Diplomatic Relations, diplomatic missions became emigrant and refugee shelters and they were frequently a target of terrorist attacks. In the tense international relations during the Cold War, diplomacy could not remain indifferent. These activities, or operations, acted as a trigger for the development of counterintelligence services which were mainly concerned with foreign diplomatic missions.

6 Period from 1648 until 1920 (Jazbec, 2009, p.48)

7 Period from 1920 until 1989 (Jazbec, 2009, p.48)

8 The source of the term »Cold War« and the start of the Cold War are described in detail in *Diplomacy - Strategy of Political Negotiations* (Vukadinović, 1994, pp. 61-72).

After the end of the Cold War period, such forms of non-diplomatic treatment of diplomats and diplomatic missions were “certainly fewer” (Vukadinović, 1994, pp. 114-115).

In the period of modern diplomacy, the diplomacy was required to comply with the principles and rules of international law, founded primarily with the UN Charter. The operation of modern diplomacy in the framework of international principles and norms is a “significant characteristic”, regardless of numerous violations (Janković cited in Milašinović, 1983, p. 34). Violations in diplomatic activities are mostly related to the intelligence service operations of diplomatic missions (Milašinović, 1983, p. 34). At the present time of the post-modern diplomacy⁹, when the expansion of public diplomacy has reached its highest level so far, it is hard to believe or expect that the public will find out about any diplomatic move (Vukadinović, 1994, p. 247).

Throughout history, **intelligence activities**, as activities without an official form, have turned into a complex state institution with the function of a professional intelligence service, to which, later, other activities were added (Milašinović, 1984, p. 5). In the past, intelligence and security services were “warriors on an invisible battlefield” and were mainly concerned with obtaining information about other countries, i.e. espionage, with examples of conspiracies, assassinations, and other “dirty” transactions, resulting in a negative or derogatory image of these services (Podbregar, 2008, pp. 21-22). The intelligence service as an activity was created much earlier in the material sense than the intelligence service in the formal sense (institution) (Rodić cited in Purg, 2002, pp. 21-22). Intelligence service in its institutionalized form of operation is the innovation of the Victorian era (the second half of the 19th century) of the United Kingdom (Britovšek, Sotlar, 2014, p. 282).

In the Early Middle Ages, intelligence activity was exclusively in the hands of individual rulers, and its importance was primarily related to the needs of conducting a war. In the Middle Ages, circumstances for the development of intelligence services were not yet the most favourable. Nevertheless, in Western Europe, espionage began to be systematically used. It was in the Middle Ages that some new elements were

9 If we try to establish a dividing line between modern and postmodern diplomacy, it can be placed in the period after the end of the Cold War in view of the changed practices and the extension of the fields diplomacy is concerned with. The period since 1989 (Jazbec, 2009, p. 48).

introduced in the establishment of the intelligence service that were reflected in the increase of its use, the improvement of its methods and the development of new methods. The outstanding intelligence services of that time were, in particular, the intelligence services of the Byzantine Empire, the Papal Curia and the Catholic Church, of the Mongol conquerors and of the Dubrovnik Republic (Rodić cited in Purg, 2002, pp. 22-23).

The first conditions for the establishment of modern intelligence services emerged with strengthening the position of interests and politics of the Italian city-states (The New Encyclopaedia Britannica cited in Purg 2002, p. 24). In the 15th century, the Italian city-states began to establish permanent diplomatic missions in foreign capital cities, and Venetians in particular, began to use them as intelligence service sources. Moreover, they developed codes so that they could secretly communicate information (Purg, 1995, p. 50).

It is the end of the 19th century which is considered to be the beginning of the development of modern espionage where the English intelligence service played the leading role. In the 19th century, some new technical means were developed that served as tools for the intelligence service (e.g. Morse code, photographic camera, wireless telegraph) (Purg, 2002, p.25). The development of the English espionage was closely linked to the expansion of colonialism (Purg, 1995, p. 51). England was the first to step into the path of the capitalism development, which required both the defence of new class relations that were emerging in the developing society and the expansion to other areas and other countries for the purpose of its own strengthening. Along with expansion and development of the country, its intelligence service was also developing and strengthening. Consequently, the English intelligence service is considered to be the oldest modern intelligence service (Lukić, 1982, p. 10).

The main function of the intelligence service until the 20th century was to gather information. The greatest transformation of its functions occurred between the two World Wars as a consequence of changed relations in the international community and the needs of individual countries, especially those playing a decisive/more important role in world affairs. The most important new functions of the modern intelligence service are the psychological propaganda and other subversive activities (terrorism, diversions, sabotage, causing crises, etc.), but its

subject matter is difficult to determine in modern times (Milašinović, 1983, pp. 72-73)

The Cold War period can be characterized as the time of intelligence services, because the intelligence services of the opposing blocs became enemies and in many important countries large bureaucracies were established consisting of strongly connected and competing services, competing with each other and denying information (Purg cited in Kuhelj, 2012, p. 27).

Today, the characteristic of intelligence services is their specialization in various fields (political, military, economic etc.). Today's intelligence expert should occupy a central place in debates related to the national security policy (Purg, 1995, pp. 51-53).

Espionage is neither a new phenomenon, nor is it the product of modern man and civilization; it was created along with man and known thousands of years ago. It is known that people have always wanted to know what their neighbour, friend or enemy thinks, what he is doing or planning to do. According to this, they were directing their activities (Lukić, 1982, p. 1).

Espionage requires a lot of courage and patience. It is a solitary game. "A spy who is sent to uncover the secrets of an enemy country has troubles enough. But a spy who renounces his own country and seeks work for an alien power faces almost certain torture is almost certainly confronted with torture and death if he is discovered" (Dowswell, Fleming, 2006, p. 89). "This work requires a calm, clear person who knows how to estimate the situation and its consequences and who has balanced views" (Ben-Menashe cited in Thomas, 2010, p. 85). Popov (1973, p. 37) says that the "game" of a double agent is "a rather ugly and dangerous thing". It is enough to make just a small mistake in this business and you can "lose your head". Nobody in this game is given the opportunity to make two mistakes.

Intelligence services almost never act in accordance with moral principles, in fact, if they would, they would achieve worse results (Popov, 1973, p. 79). Although "war is not the mother of all things", it is certainly "the mother of espionage" (Barring, 1970, p. 11). At the time of Napoleon, it was believed that "a spy could not be an honest man,"

although Napoleon claimed that the spy was worth more than 20,000 soldiers (Ambler cited in Lukić, 1982, p. 359).

Further we will consider in more detail some historical examples of “espionage.” We will focus on the methods of work of the so-called spies and search for contact points and similarities in the performance of work. We will not deal with the question whether espionage was an illegal act of diplomats or intelligence services, or it was an interference with state sovereignty, we will rather focus on methods of work, the status of persons who spied and searched for motives for spying. We will highlight the work of Duško Popov, who during the Second World War worked as a double agent for both the English and the German military intelligence¹⁰, and called himself a “super-spy” (Popov, 1973, p. 35). We will also introduce Vladimir Vauhnik, as the second example, who, before the beginning of the Second World War, worked as a military attaché of the Kingdom of Yugoslavia in Berlin and enjoyed “diplomatic status” (Bieber cited in Vauhnik, 1972, p. 8). Both persons worked more than half a century ago, so we will look at the events from a historical distance. It seems to be important to make difference between the period of the activities when there were no international regulations and the period when legal and illegal means and methods of diplomatic practice were already established.

Popov (1973, p.11) in his true story titled *Codename Tricycle* claims that he does not believe in secrets, even though he was one of the most famous secret agents (double agent)¹¹ during the Second World War. He believes that every person has the right to information, i.e. to be informed about everything on which his destiny depends. He further claims that most of the countries have laws that impose penalties in the event of disclosure of the state secrets and considers that the secret codes (state secrets) often hide the crimes of the states (Popov, 1973, p.7). Thomas (2010, p.19) similarly writes that his sources claim that the marks or classifications “confidential” and “strictly confidential” in the intelligence circles are “sometimes only means to cover up unpleasant mistakes.”

In his work, Duško Popov often used a diplomatic cover, which in-

10 The name of the German military Intelligence Service was Abwehr, and of the English it was MI6. Popov deliberately decided to betray and deceive the German Intelligence Service, so he worked on the side of the Allies during the Second World War.

11 Popov lived a triple life (as a German agent, a British agent and a Yugoslav businessman) (Popov, 1973, p. 84).

cluded his diplomatic status and related immunities and privileges¹²¹², where diplomatic bag, which he used to transfer documents, also belonged (Popov, 1973, p. 205). Sending information or communication between a secret agent and a “connection” was performed using diplomatic bag (Popov, 1973).

During the Second World War, the German Military Intelligence Agency Abwehr knew that the British Intelligence Service for Yugoslavia was at the British Embassy in Belgrade (Popov, 1973, p. 42). Abwehr was also aware of the fact that the offices for the issuance of passports at British Embassies were the most common cover for the MI6 local centres (Popov, 1973, p. 48). The German Embassy in Madrid served as a diplomatic cover for about 120 Abwehr officers and 400 additional agents were infiltrated into various companies (Popov, 1973, p. 94).

At the time of his service as a military attaché to Berlin, Vauhnik called himself “the soul of the foreign intelligence service” (Vauhnik, 1972, p. 154), and military attachés “legal intelligence service” (Vauhnik, 1972, p. 12). From the report of the head of the security police to the German Foreign Minister, it is clear that Vauhnik defines the activity of military attachés as espionage in a wider sense.¹³¹³ Jazbec (2007b, p. 57) states that military attachés, working for military diplomacy, at first were primarily informers in uniform, and that in recent times they have been “increasingly” becoming diplomats. Part of the activities carried out by military attachés by obtaining direct and indirect information and reporting on the situation in the receiving State, “borders with intelligence activity” (Jazbec, 2007b, p. 58). Some authors treat the intelligence service function of diplomats and consuls in the same way as espionage in peacetime, calling it “legal espionage” (Milašinović, 1983, p. 105).

Both Vauhnik and Popov had contacts and connections in high positions which enabled them to access quality information. Contacts and connections in diplomatic work are of crucial importance, in fact, as Jazbec (2007a, p. 128) claims, they are the basic methods of operation of a successful diplomat. The same was claimed and described by Vauhnik who said that there was too little time in Berlin to make good

12 A new cover position was created for Popov at the Yugoslav Embassy in the United States (Popov, 1973, p. 120).

For his operations in London, he used the position of the Yugoslav assistant to the military attaché (Popov, 1973, p. 199).

13 The Report of the head of the security police to the German Foreign Minister on the work of the military attaché Vauhnik (Vauhnik, 1972, p. 167).

connections with responsible persons in the General Staff, so it was difficult to get important information (Vauhnik, 1972, p. 17).

When reading Vauhnik we can come to the conclusion that direct information is very difficult to obtain, and that it is important to have knowledge in the required field (in his case, military), as well as the skill of meaningful and logical reasoning and linking of segments of data into useful information.¹⁴ According to Lukić, this systematic and organized work can be defined as “legal” espionage.¹⁵ “In the intelligence service, it is claimed again and again that only seemingly trivial things and findings lead to important discoveries, if you understand them correctly and pursue them carefully” (Vauhnik, 1972, p. 119).¹⁶

Popov also explains that “in this business”, in some cases, a very small piece of information is important in order to complete a mosaic (Popov, 1973, p. 48). “It was crumbs that were sufficient to create a more or less complete picture” (Popov, 1973, p. 60).

Systematic work can lead to almost correct conclusions (e.g. about the approximate power of the German Army), and along the paths of “social espionage” a lot of important things are obtained (for example, about the intentions of the German military leaders).¹⁷

The terms “spy” or espionage are used by many authors in conjunction with intelligence services as legally established organizations dealing with information at the state level, which are mainly relevant to the national security of a country, constitutional settlement and defence interests. Since the work of intelligence services and diplomatic-consular missions is often intertwined and complementary (Milašinović, 1983, p. 6), i.e. it is not possible to draw a clear limit between diplomatic and intelligence activities (Milašinović, 1983, p. 18), it can be con-

¹⁴ For example: based on information on the production of boats from rubber, pontoons, aircraft production, data on stocks of certain raw materials, etc. it was possible to conclude with great certainty that Germany would attack England in the Second World War. With the data on the map where the bombing sites of England were marked, it was also possible to conclude the location of the attack (Vauhnik, 1972, pp. 73-74). For example: the name of the “African Corps” commander could lead to the conclusion about the importance of African operations. “It is by the commander that the importance of the troops under his command can be judged” (Vauhnik, 1972, pp. 92-93).

¹⁵ “Legal” espionage is the acquisition of the most important data from publicly available sources, where every little thing is important, and where systematic data processing, and organized and accurate work can lead to correct conclusions (Lukić, 1982, pp. 17-19).

¹⁶ For examples, see Vauhnik, 1972, p. 119 - 120.

¹⁷ The report of the head of the security police to the German Foreign Minister about the work of the military attaché V. Vauhnik (Vauhnik, 1972, p. 172).

cluded that the work of diplomatic-consular missions is consequently related to espionage. The extent of espionage as an activity by which secured secret information is obtained, in the intelligence service operations, both Purg (2002, p.16) and Milašinović (1983, p. 64) estimate as a small proportion of intelligence service operation. According to the estimates, powerful intelligence services obtain up to 80% of information by legal channels (Milašinović, 1983, p. 137).

LEGAL REGULATION

Vienna Convention on Diplomatic Relations of 1961, provides a framework for a comprehensive and thorough **regulation of the modern diplomatic practice** (Denza cited in Simoniti, Jager Agius, 2014, p. 22), which is based on two starting points: the sovereign equality of States and the duty of maintaining international order by promotion of friendly relations among nations. The Convention defines the function of diplomacy, the protection and representation of the national interest of a sovereign state and the duty of maintaining international peace, as a fundamental principle on which the entire structure of the United Nations is based (Simoniti, Jager Agius, 2014, p. 22).

Vienna Convention on Diplomatic Relations determined, inter alia, the functions of a diplomatic mission. We will focus on the function that is specifically related to obtaining information¹⁸.

In the Convention, it is explicitly stated that the way of obtaining information can be only by lawful means, without precisely specifying what lawful means are considered to be. The limits of the right to information are often the cause of disputes (Bartoš cited in Bohte, Sancin, 2006, p. 98). Bohte and Sancin (2006, p. 99) point out that the violation of the right to information can become an interference with the state's internal affairs and that the obtaining of information from private persons is not tolerated and is qualified as spying. The interference with the internal affairs of the receiving State, according to Murty (cited in Mešič, 2015, p. 37) are the following acts: advising the Prime Minister in the receiving State on the basis of diplomatic communication; communicating with persons who are not authorized to communicate with diplomatic agents; acts for the purpose of coup

¹⁸ »Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State« (VCDR).

d'état in the receiving State and espionage; giving critical statements about the government politics of the receiving state.

Milašinović (1983, p. 36) writes that in the diplomatic practice of individual countries, in addition to internationally recognized and accepted tasks or functions of diplomatic missions, there are a lot of cases when governments impose tasks to their diplomatic missions (negative functions) that are not in compliance with generally accepted rules of diplomatic behaviour. Milašinović further states that it is important to distinguish between the periods of diplomacy, when there were no international rules, from the period in which lawful and unlawful means and methods of diplomatic practice have been known.

The most frequent violations of the lawful means (permitted means) in the work of diplomats occur in connection with the intelligence activity of a diplomat. According to Milašinović (1983, p. 39), it seems that a large part of the immunity and privileges of diplomats is intended exactly for the purpose of a smooth operation in the field of intelligence services. The Vienna Convention on Diplomatic Relations of 1961 precisely defined the system of diplomatic immunities and privileges, which created conditions for a smooth operation of diplomats, but it did not take into account, i.e. defined issues from diplomatic practice.¹⁹ He believes that science has to give additional attention to such issues, and adds that "it seems" that one of the most interesting issues is the one related to the intelligence function (Milašinović, 1983, p. 40).

Diplomatic immunity is an important diplomatic institute defined and laid down in the Vienna Convention on Diplomatic Relations²⁰. From the preamble to the Convention, it is evident that diplomatic mission enjoys immunities and privileges the purpose of which is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions (VCDR, preamble). We can say that the Vienna Convention on Diplomatic Relations extensively deals with

19 In practice, it often happens that the agreed rules are not respected and that immunities and privileges of diplomats are abused. Diplomatic practice is oriented towards action that is not in accordance with the principles and needs that are necessary for the development of good or friendly relations among countries (Milašinović, 1983, p. 40).

20 Since the Vienna Convention on Diplomatic Relations represents a fundamental codification of diplomatic law, we primarily relay on the provisions in the cited Convention. Immunities and privileges are also laid down in the Convention on special missions, accessible at URL: <http://www.pisrs.si/Pis.web/mednarodnaPogodba?id=UN-19691216/01M> and the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character, accessible at URL: <http://www.pisrs.si/Pis.web/mednarodnaPogodba?id=UN-19750314/01M>.

immunities and privileges²¹, which reflects the importance of the institute of immunities and privileges.

Diplomatic immunity is an exception to norms or principles of the internal law of a sovereign state, and the internal law, which is otherwise used and applied by the state in a sovereign way throughout its territory, does not have jurisdiction over persons and things that enjoy the immunity. We distinguish two types of abuse of diplomatic immunity in the receiving State, namely the abuse by the sending State and the personal abuse of a person enjoying immunity. Terrorism and espionage are two typical types of abuse, the so-called political abuse²², which occur to a smaller degree than personal abuse (illegal parking, speeding, minor thefts, etc.²³) (Mešič, 2015).

According to Mešič (2015, p. 54), we cannot expect that the norms of the legislation will not be violated, as is also the case with international law. In addition, violations of this kind depend on many factors and circumstances in complex international relations.

Most diplomats do not abuse diplomatic immunity, while unethical diplomats abuse it most commonly on personal level, and less on political level (Večer Magazine, 2017).²⁴

There are two standpoints regarding **international law in relation to intelligence service**.

The first, traditional approach takes a realistic view of intelligence service in the international context and it estimates that international law does not restrict (nor will restrict) the activities of most intelligence services. According to this approach, countries are motivated for intelligence-gathering (Brown, Metcalf cited in Deeks, 2016, p. 606).

The second approach, however, interprets the widespread interstate cooperation in espionage, where apparently, the states recognize the right to engage in intelligence activities acknowledging that such

21 Immunities and privileges are defined in Articles from 22 to 42 in the cited Convention.

22 For examples, see Mešič, 2015, p. 31.

23 Historically, the abuse of diplomatic immunities is also found in the area of serious crimes such as: rape, child abuse, murder, drug smuggling. For examples, see Mešič, 2015, p. 32.

24 For more details see URL: <http://www.publishwall.si/casopisvecer/post/265638/roka-pravice-jih-stezka-doseze>.

conduct complies with international law (Simmons, Neubert cited in Deeks, 2016, p. 609).

Milašinović (1983, p. 7) points out that the basic principle of international relations, which puts forward the priority of the territorial integrity and sovereignty of each state and non-interference by others that should be understood as a ban on intelligence activities on the territory of another sovereign state, is obviously neglected (either intentionally or involuntarily).

So, the basic question regarding international law and intelligence activities is whether intelligence is legally permitted form of the activity of one country towards the other? In the past, the answer to the question was categorically negative. The intelligence activity was understood in the past as a “malicious and hostile” act due to its methods and means of work. The Charter of the United Nations prohibits the war as a means of resolving disputes among nations and peoples, i.e. it prohibits the use of armed forces. The Charter allows the state to take preventive measures (to have its own army, its own weapons, etc.) for the purpose of defending itself against attacks or aggression by another state, which today significantly affects interpretation or understanding of the international legal definition of intelligence activities. Lukić (1982, p. 371) considers that at this point an issue automatically arises in respect to what falls under preventive measures of defence against attack or aggression. Is it only our own army or it is also possible to include our knowledge about purposes of a potentially aggressive state among preventive measures? He concludes that it can be undoubtedly asserted that “all preventive measures, without knowing the purpose of the potential attacker, or other countries and their forces, are only weapons from which it is shot without any bullets”. The intelligence activity should not be excluded as a preventive measure of defence, in fact, it is one of the more important ones.

In the International Law of Armed Conflicts, espionage is not prohibited, but since the adoption of the Rules or Annex to the Hague Convention (IV) of 1907²⁵, it has been considered that spies who are caught during espionage do not enjoy the status of a prisoner of war (Sancin, Švarc, Ambrož, 2008, p. 175). It is precisely defined in which

25 The basics or starting point for dealing with spies during the war were established already in 1880 in the Oxford Handbook of International Law in Armed Conflict (Lukić, 1982, p. 364).

case a person can be characterized as a spy, namely, when he acts undercover and under false pretensions (Lukić, 1982, p. 365).

Espionage is compared to or categorized as the second oldest profession (Chesterman, 2006, p. 1072). Some authors assert that there is a gap in the international law regarding espionage and that the current status of espionage in peacetime is highly vague.²⁶ According to Falk (cited in Radsan, 2007, p. 602), international law is remarkably oblivious to the peacetime practice of espionage. Leading treatises overlook espionage altogether or contain a perfunctory paragraph that defines a spy and describes his hapless fate upon capture.

Some authors refer to or point out the need to make difference between espionage in peacetime and espionage during the war. They consider that the international law which defines espionage in peacetime is outdated and that it does not keep pace with time. Demarest (cited in Radsan, 2007, p. 603) concludes that espionage is an “unfriendly act” and that the act does not violate international law.

Radsan (2007) divides literature that deals with espionage in peacetime, i.e. outside the established legal regulations during the war, into three groups. One group suggests peacetime espionage is legal (or not illegal) under international law; another group suggests peacetime espionage is illegal under international law and a third group, straddled between the other two, maintains that peacetime espionage is neither legal nor illegal.

NOT ILLEGAL ESPIONAGE

International law nowhere explicitly prohibits espionage in peacetime. Some experts believe that espionage is part of a sovereign right of a nation state (Sulmasy, Yoo, 2006, p. 628). Similarly, according to Scott (as cited Radsan, 2007, p. 604), “espionage is not prohibited under international law as an activity that fundamentally violates international law”. However, the authors who consider that espionage in peacetime is not illegal, do not want to advocate or defend espionage activities (Radsan, 2007, p. 604).

In this respect, the advocates of espionage give arguments that leaders make more informed decisions based on information obtained from

²⁶ E.g.: Demarest cited in Radsan, 2007, p. 603.

espionage (Demarest cited in Baker, 2003, p. 1094). Furthermore, espionage with regard to its historical position in terms of its acceptance or permission, is defined as a credible source of international law (Polebaum cited in Baker, 2003, p. 1094).

ILLEGAL ESPIONAGE

On the other hand, espionage is defined in most of the national laws as a criminal offense. Most of the national laws strive to prevent or to prohibit the obtaining of confidential information, on their respective territory, by foreign intelligence officers and at the same time to protect their own activity and the capacities of their states to operate and obtain confidential information abroad (Chesterman, 2006, p. 1072). Wright (2008, p.12) argues that in peacetime any penetration of the territory of a state by agents of another state in violation of the local law, is also a violation of the rule of international law. Delupis (as cited in Radsan, 2007, p. 605) argues “that espionage appears to be illegal under international law in time of peace if it involves the presence of agents sent clandestinely by a foreign power into the territory of another state”.

According to Radsan there is a dilemma regarding Delupis’s account, whether “clandestine” includes intelligence officers who enter a country under the false pretence of being diplomats (using diplomatic passports), or whether she would limit the definition to those who, unknown to the local authorities, sneak into the country. Delupis makes the further qualification that espionage is not by itself an international crime. Here she draws a fine distinction between behaviour that is contrary to international norms and behaviour that constitutes a crime. International crimes are acts that can be prosecuted before an international tribunal. To her knowledge, international tribunals, whether in Nuremberg, The Hague, or elsewhere, have not indicted or convicted anyone for the simple wrong of espionage (Radsan, 2007, p. 605).

ESPIONAGE IS NEITHER LEGAL NOR ILLEGAL

According to Silver and Hitz (cited in Radsan, 2007, p. 606), arguments that countries are much less tolerant when espionage is committed against them than when they are committing it, suggest that it may explain why no international treaties or conventions specifically prohibit espionage. Baker (2003, p. 1092) argues, that international law neither

endorses nor prohibits espionage, but rather preserves the practice as a tool by which to facilitate international cooperation. He further considers that espionage functionally permits states not only to verify that other states are complying with international obligations, but also to confirm the legitimacy of those assurances that these states provide. According to his opinion, states are more willing to cooperate because espionage is available as a tool by which to monitor foreign behaviour.

Radsan (2007, p. 602) says that the uncertainty in the literature dealing with peacetime espionage supports her thesis that espionage is beyond international consensus.

CONCLUSION

Both of the considered services or activities are intended for operation in foreign countries or in relation to foreign countries. Both services deal with the acquisition of information, especially intelligence services, which is obvious from the name itself.²⁷ Historically, both services have been related to the notion of secrecy. Diplomacy keeps distance from it, which cannot be said of the intelligence services. Diplomacy is internationally codified and consensus on its operation is adopted, but in the field of intelligence services we can say that there is no international consensus. We can conclude that primary task of intelligence services is gathering data and information, and in diplomacy it is just one of the tasks, which some people consider to be essential. More importantly, the norms from the international convention have been internationally adopted, i.e. a legitimate activity that is limited to the use of permitted means and methods.

The key differences between the two activities are that, unlike the intelligence services, diplomacy does not use secret collaborators, it is an internationally regulated activity, the limits of the allowed operations are clearly defined, illegal methods are not used and since 1945 diplomacy has been characterized by its public activity. It is exactly the key differences that in our opinion significantly influence or represent a manoeuvre space for the disputed action or espionage. Consequently, it is understandable that espionage is more often connected

27 One should not ignore the fact that many authors attach the greatest importance to the gathering of information by diplomats, i.e. their getting to know the situation in the receiving state (e.g. Bohte, Sancin, 2006, p. 98 and Milašinović, 1983, p. 39).

with intelligence services than with diplomacy. However, it seems that diplomatic immunity protecting a diplomat from the jurisdiction of the courts in the receiving state, is an attractive element for unethical activities, which should not be ignored.

Some high-profile cases of alleged espionage by the intelligence and diplomatic services in the last period²⁸, suggest that illegal means and methods are used also in modern times. The importance of data and information is shown again and again, which obviously represents added value, actually, we can say that it is power which is worth the risk and consequently, destroying international confidence²⁹ and increasing the conflict. As is commonly known, diplomats in the latest high-profile cases of espionage would also be exposed to it. Here, we can cite Milašinović (1983, p. 4), who says that the truth about the functioning of modern diplomacy is difficult to discover.

Espionage, i.e. the illegal activity by which the well-kept secrets of a particular country are acquired in an illegal manner and with illegal means is a reality that cannot be denied. The extent and the presence of espionage in the discussed areas or services is difficult to identify or measure, mainly due to the concept of secrecy of operation. We have concluded that the word “espionage” is much more often and more commonly used in relation with intelligence services than in relation with diplomacy. The services cooperate with each other, but in certain cases³⁰ they can even be said to intertwine. Intelligence and diplomacy are locked in a marriage. Not a marriage of convenience. Rather the opposite: a marriage of necessity. (Hughes, Oleson, 2016, p. 52). This is also confirmed by Milašinović (1983, p.6) who claims that diplomacy and intelligence are often intertwined and complemented, and that it is necessary to distinguish between the activities of the persons performing tasks in the framework of legal provisions and those who exceed the limits of the legal framework.

At first sight it seems that the above consideration leaves us in an ambivalent position between “pure” diplomacy and “espionage” diploma-

28 For example: the Snowden affair, Manning, eavesdropping in the case of arbitration between Slovenia and Croatia, expelled Russian diplomats from the United States, who were allegedly connected with hacking intrusions into e-mail accounts of representatives of a democratic party, etc.

29 An example of destroying trust by espionage is reflected in the “European Commission Calls on the U.S. to Restore Trust in EU-U.S. Data Flows”. Available at URL: http://europa.eu/rapid/press-release_IP-13-1166_en.htm.

30 Modern and democratic countries usually register an individual diplomat or several diplomats in the receiving state for liaison with the intelligence structures of the receiving country.

cy. A detailed and precise analysis leads us to the conclusion that a large number of espionage cases in diplomacy or by diplomats is concerned with illegal activities of intelligence services, disguised in diplomatic activities, which is certainly not in favour of the reputation of diplomacy. Operating under the guise of diplomacy seems to be generally recognized and allowed by the states in »normal« circumstances, but in the event of tightening of international relations, they publicly accuse and expel the so-called intelligence diplomats, as evidenced by recent events that followed the poisoning of a former Russian spy on British territory.³¹

Even more, it is argued that every embassy in the world has spies and that there is an unwritten understanding that the receiving states are prepared to “turn a blind eye” to what goes on within embassies. At the same time, it is emphasized that the cases should not be generalized and that there are “genuine” diplomats who gather information using entirely legal methods and respect international norms, but that among these “genuine diplomats” there are some people who are listed as diplomats but are actually intelligence officers (Glees, 2018). The difference between declared and undeclared intelligence officers in the receiving state is that the legitimate ones present their credentials to the receiving state and formally share mutually beneficial information. Spies, however, appear on the embassy’s list of diplomats, but they are involved in gathering other intelligence (Lloyd, 2018).

Espionage, or among others, the use of illegal or semi-legal methods of work, represents a decline from the diplomatic mission, it is risky, and in case of disclosure, it will undoubtedly cause tightening of relationships among countries. Certain circumstances (tightening of relationships between certain countries, wars, terrorism, etc.), also affect the functioning of diplomacy, which can trigger deviations from respecting internationally accepted code of operation, but in no way can it be and is not synonymous with the rule of operation of diplomacy or diplomats.

We can conclude that the practice of modern democratic diplomacy is moving away from bad, risky and illegal practices, and that it is be-

31 In March 2018, media reported information on the poisoning of former Russian spy Sergey Skripal on British territory. In the United Kingdom, Russia was accused of poisoning. Certain measures on the diplomatic level followed, and many countries expelled Russian diplomats. Among the “real” diplomats, as the US states, there are many “well-known informers”, that is, those who only use diplomatic status but are in fact informers under the guise of diplomacy. See more at URL: <https://insajder.com/svet/zda-bodo-izgnale-60-ruskih-vohunov-zaradi-primera-skripal>.

coming increasingly public and transparent, which gives us optimism, because it means that, despite some doubts, diplomacy is a highly professional activity that maximally works within the framework of international norms and in most cases eliminates conflicts, makes compromises and regulates international relations in a peaceful manner.

It is necessary to be aware of the fact that in the international community, the participating countries have various histories, various degrees of development and various political systems, which undoubtedly results in different practices and methods (either illegal or semi-legal) of their operation in the international community and represents a major challenge in the alignment of interest. What we think is important is the “critical mass” of the countries that respect international norms and act in accordance with them, and that in case of violations by other participants in the international community, i.e. the countries for which the internationally recognized norms represent a difficulty, such actions and deviations are appropriately neutralized as they represent a potential threat to peace and security.

Regulation of international relations is a complex and demanding process; or to put it figuratively, it is a complicated game of chess. The international norms are the smallest common denominator of the international community, and the international law in most cases the “tiger without teeth”. It would be nonprofessional, of course, to expect the norms of diplomatic law not to be violated. We could say that there are no legal norms which are never violated; however, individual deviations from the practice of the majority, can neither be generalized nor used as a synonym for certain activities, in our case diplomacy.

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