

The Just War Doctrine and Covert Responses to Terrorism

Catherine Lotrionte

It is in war that the greatest occasion exists for both political and military leaders to plead necessity, to argue that they have no choice, that what they do is necessarily imposed upon them by military imperatives. Particularly in the case of legitimate self-defense, certain acts of war are justified that would not be under other circumstances. Today, as the United States responds to the evils of terrorism, it is useful to start with an examination of the "just war" doctrine and its applicability to the current U.S. foreign policy process.¹

In the United States, covert action has historically been vulnerable to public attack. Many Americans see spying as a dirty business and intervention in the internal affairs of other nations as inconsistent with their professed principles of non-intervention. Nonetheless, others believe that if the United States is to protect national interests, both at home and abroad, and fulfill its international responsibilities in a harsh environment where terrorism is part of the international community, it has little choice but to engage in such covert activities.

Today, terrorism adds a new level of gravity to this debate. A close look at the doctrines of just war and natural law, the historical role of covert action in U.S. foreign policy, and the substantive failure of international law to provide explicit norms regulating covert action helps put this controversial

Catherine Lotrionte
is Assistant General
Counsel for the Central
Intelligence Agency
and Adjunct Professor
in the Security Studies
Program at Georgetown
University.

and emotionally-charged subject into perspective, while also suggesting a set of ethical guidelines for action.

The natural law approach and the just war doctrine afford an immensely useful set of principles that can help guide policymakers in answering the question of when the United States should resort to covert operations. As history has demonstrated, we cannot escape reliance on human judgement, and judgement will depend on how we view our place in both history and the international community, in addition to our responsibilities in the world. At times, this has involved the nation in painful dilemmas, as it often tries to do two quite different things simultaneously. It strives to adhere to certain principles and values that often conflict with the means necessary to protect its security and advance its interests. The decisions we make about covert action will ultimately reflect the interaction between our estimates of the dangers we face and the values we hold.

Contemporary International Law on the Use of Force. In 1945, the United Nations Charter laid the foundation of a "new world order" after the Allied victory in World War II. The UN Charter established the United Nations Organization to maintain international peace and security, as well as to promote friendly cooperation among nations in solving international economic, social, cultural, and humanitarian problems. The UN Charter prescribed the international norms outlawing the threat or use of force—the principal norms on which the new order stands.¹

The UN Charter was originally designed to allow states to peacefully resolve their disputes and prevent the use

of force as a dispute resolution mechanism.² Article 2(4) of the UN Charter expresses the key prescription in international law regarding the use of force. This article declares that:

[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.³

The reference to "force" rather than war is significant because it covers situations in which violence is employed but falls short of the technical and domestic legal requirements of the state of war. While some international scholars have interpreted "threat or use of force" to mean both armed and non-armed force,⁴ most have refrained from extending this interpretation beyond armed intervention.⁵ Indeed, the primary purpose of the formation of the United Nations was the prevention of war,⁶ a fact that is evident from the legislative history captured at the Conference at San Francisco in 1945.⁷ From this point of view, the UN Charter prohibits intervention within the context of armed force, and does not comment on more subtle forms of intervention that do not involve, at the very least, the threat of force.⁸ The UN Charter was intended to outlaw war as well as all lesser uses of force including the threat of force; however, the language used is admittedly ambiguous.⁹ There is continuing debate among scholars as to whether the words of Article 2(4) should be interpreted restrictively,¹⁰ so as to permit force that would not contravene the clause, or as reinforcing the primary prohibition.¹¹

The line separating improper, illegal intervention from legitimate interference is quite difficult to draw. While most scholars agree that dictatorial interference violates international law and that mere diplomatic contact rests well within the realm of permitted behavior, those attempting to distinguish between legal and illegal activities stumble when more subtle forms of intervention are at issue. Does providing financial support to an established rival political party violate any international norm? Is the provision of funds "coercive" as the word is generally used in the UN resolutions? Does providing propaganda in another country violate any international norm? Would this be "coercive?" Or is this support for dissenting groups merely creating "more speech" within the domestic forum, thus ensuring that citizens of the country make more informed decisions and have a wider range of choice?

Foreign Policy and Covert Action.

Throughout American history, the role of secrecy within foreign policy has been dictated by perceived threats against national security. The collapse of Soviet-American cooperation late in World War II convinced U.S. foreign-policy makers that Soviet communism posed a critical challenge to U.S. security. The development of the Cold War and the withdrawal of European colonial powers from Asia made it clear that the United States could not avoid a much deeper involvement in world politics than had formerly been the case in times of peace.

The United States lacked not only a foreign policy adequate to cope with this new situation, but also the government institutions necessary to develop and carry out an effective policy. Institutions and procedures had to be established to enable

the president to bring together key U.S. officials who dealt with the various aspects of foreign policy to consider the relevant facts, weigh alternative courses of action, make the necessary policy decisions, and see that they were carried out. The result was the National Security Act of 1947,¹¹ which created the National Security Council (NSC) to help the president formulate foreign policy, and established the Department of Defense as a step toward unification of the armed forces. This act also created the CIA.¹²

U.S. leaders concluded that the United States needed an organization capable of performing certain foreign policy functions that fell short of war yet went beyond traditional instruments of diplomacy. The authority granted to the CIA "to perform such other functions and duties related to intelligence affecting the national security as the NSC may from time to time direct" has been used as the statutory authorization for covert actions. In 1947, the CIA's general counsel determined that the CIA could undertake covert actions if directed by the NSC and if Congress appropriated funds for such activities.¹³ Since 1976, the CIA has also relied on specific authorization contained in successive executive orders issued by presidents Ford, Carter, and Reagan to conduct covert actions.¹⁴

Fifteen years later, in the 1991 Intelligence Authorization Act,¹⁵ the U.S. Congress redefined "covert action" more specifically as "activities of the United States Government to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly, but does not include... activities the primary purpose of which is to acquire intelligence..."¹⁶ While some commenta-

The nature of most "covert" operations is largely misunderstood.

tors have attempted to restrict the use of the term "covert actions" to describe only those actions that specifically involve coercion of some form,¹² most authorities do not adhere to this definition.

Legality of Covert Action under International Law.

How does covert action fit within the international legal framework of international law? As analyzed above, before a country or the international community can use Article 2(4) as a legal basis for sanctioning an activity, it must determine if that activity constitutes "force" as defined by the Article. Arguably, the scope of Article 2(4) prohibits only "armed force."¹³ The general acceptance of the view that the term "force" in Article 2(4) indicates "armed force" has caused most scholars to neglect to consider, "What is force?"¹⁴ Nevertheless, in order to include covert action in an international regime designed to govern "explosive effect(s) with shock waves and heat,"¹⁵ this is not a tangential question.

The nature of most "covert" operations is largely misunderstood. The typical "covert action" does not involve the threat or use of military force against foreign states,¹⁶ and many do not involve "coercion" of any sort. The widespread misunderstanding is not all that surprising, however, as most "special activities" remain unknown to the public. Those that are "leaked" and judged by the media and allotted significant press coverage tend to be only the most controversial. While only a tiny fraction of CIA operations have involved efforts to assassinate

foreign leaders¹⁷ or to finance paramilitary armies to replace objectionable foreign governments,¹⁸ such "covert operations" receive the greatest publicity. Much of the public, therefore, associates the term with activities widely viewed as nefarious¹⁹ and contrary to democratic values.

It was at the height of U.S. concern about the threat of international communism that President Eisenhower appointed a panel to make recommendations regarding covert political action as an instrument of foreign policy. The panel, named after its chairman, General Jimmy Doolittle, included the following statement in its report:

It is now clear that we are facing an implacable enemy whose avowed objective is world domination by whatever means and at whatever costs. There are no rules in such a game. Hitherto acceptable norms of human conduct do not apply. If the U.S. is to survive, long-standing American concepts of "fair play" must be reconsidered. We must develop effective espionage and counterespionage services and must learn to subvert, sabotage and destroy our enemies by more clever, more sophisticated means than those used against us. It may become necessary that the American people be made acquainted with, understand and support this fundamentally repugnant philosophy.²⁰

Although this approach may initially appear radical, in the context of the

times, this approach was consistent with several schools of thought in international affairs that laid the foundation for U.S. foreign policy during the Cold War. The first is the "realist" tradition of international affairs, which traces its origins from the Greek historian Thucydides through the philosophies of Machiavelli, Hobbes, Spinoza, and Rousseau to modern theorists such as Morgenthau and Niebuhr. Realists emphasize the primacy of power in international affairs, and exclude morality and law from foreign-policy making.¹³ During the Cold War, realists supported the need to use covert action against communism either because they believed that the exceptional circumstances of the times required it or because they judged that it was simply one of the methods that states used to struggle with each other. As the quote from the Doolittle report indicates, however, the authors of the report were uncomfortable with the "repugnant philosophy" they deemed necessary. Although covert action was recognized as an important and necessary U.S. foreign policy tool, the United States never abandoned its moral traditions.

Since the fall of the Berlin Wall and the dissolution of the Soviet Union, the realist thought that formed a compelling rationale for both military and covert action in the early Cold War period has dissipated. Best evidenced by recent events, the United States still faces a dangerous world, arguably a more uncertain and dangerous one than that of the Cold War in which the enemy was clearly defined. The new world order is filled with hostile states and non-state actors, violent terrorist attacks, narcotics trafficking, and the proliferation of weapons of mass destruction. In such an environment,

U.S. policymakers are likely to still consider covert action a necessary foreign policy tool. Thus far, the United States has responded to terrorism with both overt and covert military operations. What frame of reference, then, should replace the Cold War framework that has shaped covert action policy since the founding of the CIA? And how should covert action policy be used in response to these new threats?

The Natural Law Approach and Just War Doctrine.

The writings of Saint Thomas Aquinas provide an especially important and authoritative source for an examination of natural law. For Aquinas, "natural law" refers to the most basic prescriptions of morality and practical reason. They are known as laws because of their prescriptive character, and as natural because they are innate to human understanding. Natural law is grounded in those desirable activities that perfect and fulfill human beings. These activities include such things as knowing reality, relating to others decently, and staying alive and healthy. Aquinas's *ius* was defined as "that which is just in a given situation."

According to the natural law tradition, law and political decision-making, insofar as they are human activities subject to rational control, are essentially related to moral principles and norms. Because they serve to implement and create those components of a rich and full communal existence that morality demands we respect and political society exists to promote and protect, the goals of political decisions, including the law, are essentially moral. Politics and law establish conditions for the peaceful and just pursuit not only of the necessities of life, but also those that contribute to life's full

flourishing and perfection through science, religion, play, and excellent achievement. Still, most laws and policies are not simple projections of the moral norms which demand respect and concern for worthwhile human activities. Invention and decision are necessary to implement these moral purposes and make moral objectives concrete.¹¹ Consequently, political leaders need the virtue of practical wisdom to properly fulfill their social role. Of course, there is no guarantee that they will have it, but

and choice impossible, then there are grounds for excuse but not justification. Thus, the natural law tradition resolves conflicts between morality and political necessity in favor of morality.

Aquinas specified three conditions for the decision to go to war: the action must be ordered by proper authority, the cause must be just, and the authority must have a right intention of promoting good or avoiding evil.¹² Other authorities have subsequently added three additional criteria: action involving force must be a last

The natural law tradition resolves conflicts between morality and political necessity in favor of morality.

insofar as their decisions are compatible with rationally-derived moral principles, their authority remains.

Theorists of natural law believe that political leaders must make prudent decisions that take into account the possibilities for effective action and the interests of the polity for which they bear responsibility. But the possibilities they consider and the interests they prudently pursue must be evaluated by moral standards. While theorists of natural law recognize the circumstantial pressures faced by politicians, they refuse to regard such circumstances as justification for actions contrary to the moral law. A political authority may feel compelled by such necessities, but necessities cannot justify immoral actions, for these necessities do not ordinarily make the consideration of morally-acceptable alternatives impossible—and if deliberation and choice are possible, then it is possible, although difficult, to choose to follow the moral law. When necessities do make deliberation

resort, and all peaceful alternatives must have been exhausted; there must be a reasonable probability of success; and the damage created by war must be proportionate to the injury it is designed to avert or the injustice which occasions it.¹³ Once these conditions are met, the belligerent is subject to two further constraints in seeking his military objectives: his actions must be directed against the opponent, not against innocent people, and the means of combat must be proportionate to the just ends envisioned and must be under the control of a competent authority.¹⁴

The first of these constraints has been further refined, under the "principle of double effect," to encompass situations in which injury to innocent parties is unavoidable. Aquinas formulated the principle as follows:

There is nothing to hinder one act having two effects, of which one only is the intention of the agent,

while the other is beside his intention. But moral acts receive their species from what is intended, not from what is beside the intention, as that is accidental.³¹

Thus, under this principle, a belligerent may be justified in permitting incidental evil effects if there is good reason. The conditions governing this, however, are held by most commentators to be exceedingly strict. For example, the action taken must not be evil in itself; the good effect, and not the evil effect, must be intended; and the good must not arise out of the evil, but both must arise simultaneously from the action taken.³²

Relevance of the Natural Law Approach and the Just War Doctrine to Covert Action.

What do these theoretical and philosophical doctrines have to do with covert action and its role in responding to terrorism? Terrorism kills ordinary citizens and no defense is afforded. These people are killed simply to instill fear. Terrorism is associated with the demand for unconditional surrender and tends to rule out any sort of compromise settlement. For policymakers deliberating over possible responses to such acts, a standard for selection of just covert actions can be developed by analogy with the long-standing efforts to differentiate just from unjust wars with special attention given to the criteria of just cause and proportionality.³³

Just cause and proportionality constitute the formal aspects of natural law and can be applied to a broad range of situations where one must harm another, in the form of punishment and political, economic, or military intervention. It would appear that a framework based

upon the tenets of the natural law approach and the doctrine of just war could be useful for evaluating covert actions that result in economic dislocation, distortion of political processes, or manipulation of information because these cause suffering or moral damage, as war causes physical destruction.

The just war doctrine is equally relevant as it poses key questions: Is the operation directed at a just cause, properly authorized, necessary, and proportionate? Is it likely to succeed, and how will it be controlled? Is it a last resort, a convenience, or merely an action taken in frustration?

Each of these questions has many facets. *Just cause*: Exactly what are the objectives of the operation? Is it defensive—to repel an identifiable threat—or is it intended to redress a wrong, to punish a wrongdoing, or to reform a foreign country? What specific changes in the behavior or policy of the target country, group, or individual is sought? *Just intent*: What will be the likely result in the target country and in other foreign countries? How will the United States or the international community benefit? How can success be determined? *Proper authority*: Who has reviewed the proposal? Are there dissents? Was there a deliberative review process that was effectively implemented? *Last resort*: What other policies have been tried? Why have they not been effective? *Probability of success*: What is the likelihood that the action will succeed? Are there differing views of the probability of success? How does the view of disinterested observers differ from that of advocates or opponents? *Proportionality*: What specific methods are being considered? Does the proposal envision the use of lethal force, sabotage, economic disruption, or false information?

Why are these methods necessary? Do they mimic those used by the adversary, or are they potentially more damaging or disruptive? If so, what is the justification? *Discrimination and control*: What steps will be taken to safeguard the innocent against death, injury, economic hardship, or psychological damage? If some damage is inevitable, what steps are being taken to minimize it?

Natural law's approach to practical wisdom recognizes the difficulties of incorporating changes in the world with

maintaining a credible ability to use force, through intelligence collection, covert action, or other means, is an important aspect of deterrence and international peace and security. Undeniably, the massive damage to the World Trade Center, the Pentagon, and U.S. commercial airliners, involving a horrible loss of life, were "armed attacks" against the United States, thus allowing for forcible measures of self-defense against the perpetrators, even under the most conservative reading of the UN

Intervention is not *prima facie* immoral or unlawful simply because it is covert.

the political leaders' responsibility for practical judgement. General moral norms often fail to determine what particular sort of society certain world leaders should seek to fashion. Other leaders must, according to the doctrine of natural law, act as morally as possible in response. That action will depend on a variety of contingent factors, including the technological and political potential for mutual aid and cooperation. The casuistry needed for practical judgement must take these factors into account. For that, reasonable human decision is needed, and this in turn requires the practical wisdom of leaders. This acknowledgment of contingency reflects that the natural law tradition, though a moralist approach to political and international decisions, affords political leaders the discretion they need to do their job.

Conclusion. The strengthening of international order requires the control and reduction of the use of force across international borders. In addition,

Charter and the strictest definition of "use of force." The prevention of future terrorist attacks appears to necessitate the use of covert action. In the realm of covert action, however, where an act could be interpreted as intentionally causing a destructive effect within the sovereign territory of another state and as an unlawful use of force according to Article 2(4), there is a need for a higher level of scrutiny within the approval process on behalf of the state conducting the covert action.

The United States intervenes in the affairs of foreign countries in a variety of ways that clearly pose political and ethical questions. Still, such intervention is not *prima facie* immoral or unlawful simply because it is covert. Individuals will inevitably disagree as to whether or not the ends justify the means in particular circumstances. Policymakers may agree as to whether a proposed intervention is necessary, judicious, and well conceived. What is required is a sense of proportion and a determination not to

be unduly influenced by short-term considerations. Even Senator J. William Fulbright, in an article attacking many of the CIA's activities and their corrosive effects on American values, says that rules of this process cannot be rigid: "We are compelled, therefore, to lay down a qualified rule, a rule to the effect that the end almost never justifies the means, that our policy must almost always be open and honest and made in accordance with constitutional procedure."¹¹ While these qualities may be difficult to gain and hold, the guidelines suggested in the article will provide policymakers with a useful tool to use during this decision-making process.

These suggested guidelines will not end controversy regarding covert action, nor will they guarantee that inappropriate or unethical actions will not be taken in the future. Furthermore, a process based on

the just war doctrine will not reassure those who oppose covert action in all forms. Nonetheless, in light of the fact that covert action is likely to remain in the arsenal of states for the foreseeable future, the guidelines suggested here, grounded in the principles of just war doctrine and natural law, help put this debate into perspective. Reforming the process along the lines suggested would signal that the United States discriminates between the soldier who fights a just war and the terrorist that prosecutes an unjust war. In short, such reform would show that the United States is concerned with issues of right and wrong, and not merely with power.

Author's Note: The author would like to thank Anthony Clark Legend for assistance and comments made during the preparation of this study. The views expressed in this article are those of the author alone and do not necessarily reflect the position of the U.S. government.

NOTE 5

1 For an exhaustive analysis of the "just war" theory see E.B.F. MORGAN, *THE NATURAL LAW TRADITION AND THE THEORY OF INTERNATIONAL RELATIONS* (1975).

2 See LOUIS HUBER, *INTERNATIONAL LAW, CASES AND MATERIALS* 884 (1993).

3 See Oscar Schachter, *International Law: The Right of States to Use Armed Force*, 82 *MINN. L. REV.* 1620, 1620 (1984).

4 See Dinstein, *supra* note 3, at 84.

5 See, e.g., Hans Kelsen, *General International Law and the Law of the United Nations*, in *UNESCO: THE YEARBOOK OF INTERNATIONAL LAW* 4-5 (1966).

6 See Quincy Wright, *Subsidiary Intervention*, 54 *AM. J. INT'L L.* 521, 529 (1960).

7 See *id.*

8 See Ribaut, *supra* note 6, at 120.

9 See Report of the International Law Commission to the General Assembly, 2 *Y.B. INT'L L. COMMISSION* 123, 123-123, U.N. Doc. A/CN.4/SER.A.

10 See Oscar Schachter, *The Right of States to Use Armed Force*, 82 *MINN. L. REV.* 1620 (1984).

11 See, e.g., D.W. BOWEN, *SELF-DEFENSE OF INTERNATIONAL LAW* 152 (1968).

12 See BROWNE, *supra* note 11, at 268.

13 National Security Act of 1947, ch. 343, section 102, 61 Stat. 495, 497-99 (1947) (codified as amended at 50 U.S.C. § 403 (1982)).

14 For a history of the events leading to the creation of the CIA, see J. ROSENBERG, *THE AMERICAN* (1965).

15 See DEPARTMENT OF STATE, *THE CIA 37-III* (1987).

16 See J. OLSZEK, *PERFORMING SERVICES FOR DEFENSE* 211-17 (1980).

17 See generally Executive Order No. 11906, 3 C.F.R. 90 (1977) (Ford); Executive Order No. 12036, 3 C.F.R. 112 (1979) (Carter); Executive Order No. 12533, 3 C.F.R. 200 (1982), *repealed in* 50 U.S.C. § 401 (1982) (Reagan).

18 Intelligence Authorization Act, Fiscal Year 1991, Pub. L. No. 102-88, 1991 U.S.C. C.A.N. (105 Stat.) 429.

19 50 U.S.C.A. § 413(d) (1992).

20 See, e.g., Comment, *The Legality of Operations Under Contemporary International Law*, 1 *LA. RACE L.J.* 139, 142 (1984).

21 See BROWNE, *supra* note 11, at 153.

22 See Schachter, *supra* note 4, at 1624.

23 See BROWNE, *supra* note 11.

24 W. MICHAEL REISBERG & JAMES E. BAKER, *REVIEWING COVERT ACTION PROGRAMS, COVERTS, AND FORMS OF COVERT COERCION AS SETS OF INTERNATIONAL AND DOMESTIC LAW* 128 (1992).

25 See Exec. Order 12333, part 2.11, 3 C.F.R. 1982 Comp. *repealed in* 50 U.S.C. § 401 (1988).

26 See, e.g., JOHN HALE, *INT. WAR AND PUBLIC ORDER: COERCIVE METHODS, LIBERTY OF VIOLENCE AND THE ARMED FORCE* 212 (1993).

27 See REISBERG & BAKER, *supra* note 24, at 49-50.

28 *Report of the Special Study Group (Doyle Committee)* (1975).

the Covert Activities of the Central Intelligence Agency, 30 September 1964 (excerpts) in *The CIA and the Assassination of Kennedy*, HANCOCK AND DOUGLASS 144 (William M. Leary, ed., 1984).

28 See Jack Donnelly, *Tenth-Century Religion in the Mirror of Byzantine Icons* 93 (Nardin and Mapel, eds., 1992).

29 See *id.* at q. 95, a. 2.

30 See Thomas Aquinas, I-2 *Summa Theologiae* q. XL, a. 1 (1942).

31 See National Conference of Catholic Bishops, *The Challenge of Peace* (Washington, U.S. Catholic Conference, 1983), pp. 29-32.

32 See Aquinas, *supra* note 96, at q. XII, a. 1.

33 *Id.* at q. XLIV, a. VII.

34 See PAUL RUSSELL, *WAR AND CHRISTIAN CONSCIENCE* 47-8 (1969).

35 See *id.*

36 Senator J. William Fulbright, *We Must Not Fight for Oil For*, *The New York Times Magazine*, April 23, 1967.